SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 659

THE UNITED STATES OF AMERICA, APPELLANT

vs.

CLAUDE CHAMBERS AND BYRUM GIBSON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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1 In Supreme Court of the United States

October Term, 1933

No. 659

THE UNITED STATES OF AMERICA, APPELLANT

v.

BYRUM GIBSON AND CLAUDE CHAMBERS

Case on Appeal

Question involved

The constitutional question involved in this appeal is this:

Does the repeal of the eighteenth amendment by the adoption of the twenty-first amendment on December 5, 1933, render inoperative the National Prohibition Law and deprive United States district courts of the power to try and, upon conviction, sentence defendants for violations of the law occurring on or before December 5, 1933?

The foregoing question arose in this case wherein the defendants were indicted, as will appear on record, at the June term, 1933, of the United States District Court for the Middle District of North Carolina, for a violation of the National Prohibition Act. One of the defendants pleaded guilty to the indictment at that term, but prayer for judgment was continued until the December term, 1933, in order that the other defendant might be tried at the same time before judgment was pronounced. The case was called for trial on December 6, 1933, whereupon the defendant Chambers filed a plea in abatement to dismiss the action for the reasons set forth in the plea. The defendant Gibson demurred to the jurisdiction of the court and moved to dismiss the indictment as it charged no offense
2 against him under the present law, the same having become inoperative by virtue of the repeal of the eighteenth amendment which was accomplished on December 5, 1933. The court sustained the motions and discharged the defendant on the ground that it had no jurisdiction, having been deprived thereof by the repeal of the eighteenth amendment through the operation of the twenty-first amendment. To which ruling the United States attorney then and there excepted and the exception was allowed.

The following constitutes the written record of the proceedings:

3 IN UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF NORTH CAROLINA, GREENSBORO DIVISION

June Term, 1933

INDICTMENT

Filed June 5, 1933

The grand jurors of the United States of America, within and for the Middle District of North Carolina, being duly empaneled, sworn, and charged at the term and in the district and division aforesaid, and inquiring for that district, upon their oaths do present:

That heretofore throughout the period of time beginning on or about the 20th day of December, 1932, and continuing down to the date of the filing of this indictment, at the County of Rockingham, in the Greensboro Division of the Middle District of North Carolina and within the jurisdiction of this court, Claude Chambers and Byrum Gibson, whose more full and true names are to the grand jurors unknown, hereinafter called the defendants, unlawfully, wilfully, knowingly, and feloniously, did combine, conspire, confederate, and agree together among themselves and with each other, and with divers other persons whose names are to the grand jurors unknown, in an unlawful conspiracy, to commit certain offenses against the United States, to wit, to violate the provisions of the act of Congress approved October 28, 1919, commonly known as the National Prohibition Act, and acts amendatory thereof and supplemental thereto; that is to say, said defendants unlawfully, wilfully, knowingly, and feloniously did combine, conspire, confederate, and agree together and with each other and with divers other persons whose names are to the grand jurors unknown to unlawfully, wilfully, and knowingly manufacture, possess, sell, barter, deliver, furnish, transport, and receive orders for intoxicating liquors containing more
4 than one half of one percent of alcohol by volume and fit and intended for use for beverage purposes, and to possess materials designed for the manufacture of intoxicating liquors, otherwise than as authorized in the aforesaid act of Congress commonly known as the National Prohibition Act, and acts amendatory thereof and supplemental thereto.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that in pursuance of said unlawful conspiracy and to effect the objects thereof, at the Middle District of North Carolina, and within the jurisdiction of this Court, said defendants, at the several times and places hereinafter mentioned in connection with their respective names, did do the following

OVERT ACTS

1. On or about the 20th day of December 1932, in Rockingham County, Claude Chambers and Byrum Gibson did possess intoxicat-

ing liquor containing more than one half of one percent of alcohol by volume and fit for beverage purposes, to wit, about 115 gallons of whiskey, the exact amount being to the grand jurors unknown.

2. On or about the 20th day of December 1932, in Rockingham County, Claude Chambers and Byrum Gibson did transport intoxicating liquor containing more than one half of one percent of alcohol by volume and fit for beverage purposes, to wit, about 115 gallons of whiskey, the exact amount being to the grand jurors unknown.

Against the peace and dignity of the United States of America and contrary to the form of the statute of same in such case made and provided.

SECOND COUNT

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That Claude Chambers and Byrum Gibson, whose more full and true names are to the grand jurors unknown, on or about the 20th day of December A.D. 1932 and heretofore before the finding of this indictment, at Rockingham County, in the Greensboro Division of the Middle District of North Carolina and within the jurisdiction of this Court, did knowingly, wllfully, and unlawfully have and possess a large quantity of intoxicating liquor, to wit, about 115 gallons of whiskey, the exact amount and description of which is to the grand jurors unknown, containing more than one half of one percent of alcohol by volume and fit for use for beverage purposes, in violation of title II of the National Prohibition Act, Approved October 28, 1919, and acts amendatory thereof and supplemental thereto, against the peace and dignity of the United States of America, and contrary to the form of the statute of same in such case made and provided.

THIRD COUNT

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That Claude Chambers and Byrum Gibson, whose full and more true names are to the grand jurors unknown, on or about the 20th day of December, A.D. 1932, and heretofore before the finding of this indictment, at Rockingham County, in the Greensboro Division of the Middle District of North Carolina, and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully, and feloniously transport a certain quantity of intoxicating liquor, to wit, about 115 gallons of whiskey, the exact amount of which is to the grand jurors unknown, containing more than one half of one percent of alcohol by volume and fit and intended for use for beverage purposes, in violation of title II of the National Prohibition Act, approved October 28, 1919, and acts amendatory thereof and supplemental thereto, against the peace and dignity of the United States of America, and contrary to the form of the statute of same in such case made and provided.

FOURTH COUNT

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That Claude Chambers, whose more full and
6 true name is to the grand jurors unknown, on or about the 20th day of December 1932 and heretofore before the finding of this indictment at Rockingham County, in the Greensboro Division of the Middle District of North Carolina, and within the jurisdiction of this Court, did wilfully, knowingly, unlawfully, and feloniously transport intoxicating liquor containing more than one half of one percent of alcohol by volume and fit and intended for use for beverage purposes, in violation of title II of the National Prohibition Act, approved October 28, 1919, as amended and supplemented; to wit, about 115 gallons of whiskey, and that Claude Chambers, defendant herein, had heretofore within two years been convicted of a violation of the said act; that is to say, the said Claude Chambers on, to wit, February 5th, 1932, at Greensboro, in the District Court for the Middle District of North Carolina, was charged and plead guilty to a violation of the National Prohibition Act on a charge of possession and sale of whiskey and maintaining a nuisance, and was sentenced to four months in jail, against the peace and dignity of the United States of America and contrary to the form of the statute of same in such case made and provided.

And the grand jurors further present that Claude Chambers has heretofore been convicted for an offense of the same nature as herein charged and set out in court no. 2, which is now charged as a second offense; that is to say: On the 5th day of February 1932, at Greensboro Court, the said Claude Chambers plead guilty to a charge of possession and sale of intoxicating liquor, to wit, whiskey, and maintaining a common nuisance, and on the same date he was sentenced to four months in jail (#1481-G).

And the grand jurors further present that Byron (Byrum) Gibson has heretofore been convicted for an offense of the same nature as herein charged and set out in counts nos. 2 and 3, which is
7 now charged as a second offense; that is to say: On the 23rd day of January 1928, at Greensboro Court, the said Byron (Byrum) Gibson plead guilty to a charge of possession and transportation of intoxicating liquor and maintaining a nuisance, and on the same date he was given three months in jail for possession, three months for transporting, to begin at expiration of sentence for possession, and given eight months on nuisance charge, not concurrent, to begin at expiration of other sentences; sentence suspended and Gibson placed on probation for three years.

Against the peace and dignity of the United States of America and contrary to the form of the statute of same in such case made and provided.

(Signed) J. R. McCRARY,
United States Attorney.

8 IN UNITED STATES COURT

No. 1999

UNITED STATES

vs.

CLAUDE CHAMBERS, BYRUM GIBSON, ROCKINGHAM COUNTY

Docket entries

June 5, 1933. Indictment filed.

June 5, 1933. Case called for trial as to the defendant Claude Chambers. Plea of guilty. Prayer for judgment continued. Continued as to Byrum Gibson.

December 6, 1933. Case is called for trial as to the defendant Byrum Gibson and called for sentence as to the defendant Claude Chambers.

Through their attorneys, Walser and Casey, the defendant Claude Chambers offers a plea in abatement, as appears of record, and a demurrer to the jurisdiction of the court on account of the repeal of the eighteenth amendment is offered by defendant Byrum Gibson. Motions of defendants are sustained. Exception by J. R. McCrary, United States attorney. Exception allowed and notice is given in open court of intention to appeal to the Supreme Court of the United States. United States is allowed 15 days to prepare its bill of exceptions, and the defendants are allowed 5 days thereafter to file exceptions thereto, and the term of this court is extended 25 days for the purpose of settling the bill of exceptions, and for making any other orders necessary.

December 6, 1933. Plea in abatement by Claude Chambers filed.

December 6, 1933. Filing demurrer by defendant Byrum Gibson.

9 December 6, 1933. Filing order signed by Judge Hayes sustaining motions of defendants and extending term of court.

December 12, 1933. Filing petition for appeal and order allowing same signed by Judge Hayes.

December 12, 1933. Filing assignment of errors.

December 12, 1933. Filing citation as to Claude Chambers, service accepted, December 12, 1933.

December 12, 1933. Filing citation as to Byrum Gibson, service accepted, December 12, 1933.

December 12, 1933. Filing waiver of right of opposition to jurisdiction of the Supreme Court of the United States.

December 12, 1933. Filing order signed by Judge Hayes as to what shall constitute the record on appeal.

10 In United States District Court

[Title omitted.]

Plea in abatement

Filed December 6, 1933

The defendant, Claude Chambers, comes into court and enters a plea in abatement and objects to the court entering any judgment in the above matter and says:

That amendment no. 18 of the Constitution of the United States of America and all laws passed in conformity therewith have been repealed and there is no law of the United States of America constituting the allegations of the indictment herein, to which this defendant has pleaded guilty, a crime for which there is prescribed by the law any punishment, and that the court has no jurisdiction to proceed to judgment and that this defendant be discharged.

This the 6th day of December 1933.

(Signed) WALSER & CASEY,
Attorneys.

[*Duly sworn to by Claude Chambers; jurat omitted in printing.*]

11 In United States District Court

[Title omitted.]

Demurrer

Filed December 6, 1933

The defendant, Byron Gibson, comes into court and demurs to the indictment herein and says:

That the indictment does not set forth facts which constitute a crime under the Constitution and the Statutes of the United States of America in that the 18th amendment of the Constitution and the statutes passed by the Congress of the United States has been repealed and that the allegations of the said indictment do not constitute a crime against the laws of the United States of America, and that this court has no jurisdiction to proceed to trial, and that the indictment be dismissed.

This the 6th day of December 1933.

(Signed) WALSER & CASEY,
Attorneys.

[*Duly sworn to by Byron Gibson; jurat omitted in printing.*]

12 In United States District Court for the Middle District of North Carolina, Greensboro Division

Opinion

Filed December 6, 1933

HAYES, District Judge.

Amendment XVIII of the Constitution of the United States was a grant of power to the Federal Government prohibiting the manufacture, sale, etc., of intoxicating liquor for beverage purposes. The National Prohibition Act and the amendments thereto were enacted by Congress under the power granted to it through the amendment, Druggan v. Anderson, 269 U.S. 36. Congress, of course, can exercise no power except such as is delegated to it by the Constitution. In the absence of the amendment, the act would have no constitutional authority upon which to rest—such a law would be unconstitutional and void.

On December 5, 1933, the President of the United States and the Secretary of State proclaimed the adoption of amendment XXI. By it amendment XVIII is repealed without reservation or limitation.

Amendment XXI became effective as law immediately upon its ratification—an amendment to the Constitution becomes a part of it the instant it is ratified. Druggan v. Anderson, supra. The operation and effect of the United States Constitution and amendments thereto are not construed by rules governing statutes and State constitutions. Our system of government makes the Federal Constitution the supreme law of the land. Congress, the legislatures of the several States, and the people are bound by its provisions.

13 The extent of its powers is to be determined by its existing provisions. The powers are effective only while they remain in the Constitution. "The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will." Cohens v. Virginia, 19 U.S. 120, 174.

The delegated powers of amendment XVIII are effective only during the retention of the amendment. Acts of Congress in keeping with those powers are valid only during the life of the amendment. If the acts of Congress must be within the powers authorized by the provision of the Constitution, an act cannot survive as law when the constitutional power authorizing it is eliminated. If the National Prohibition Act is still in force, amendment XXI is denied immediate effect: it is postponed until all violations of the Prohibition Act, occurring before December 5, 1933, are finally disposed of by the courts. Thus the two amendments would exist at the same time, notwithstanding that one repeals the other. The people granted the powers enumerated in amendment XVIII, but they revoked those powers by amendment XXI. The revocation occurred when the

repeal was ratified. It was not repealed in part, but it was repealed in its entirety. When the proposal was offered in Congress, various efforts were made to salvage some portions of the amendment, but the final form of section one was outright repeal, and section two is really a new grant of power.

It follows that legislative acts existing only by virtue of the amendment became inoperative when the power itself was withdrawn by the repeal of the amendment. Repeal of the National Prohibition Act by Congress is not necessary, for the law has no power to function without constitutional sanction. This construction gives full force and effect to the amendment during the period it was a part of the Constitution.

14 We have at least one instance of the withdrawal from the Federal Constitution of the power hitherto granted under it, and an opinion rendered by the United States Supreme Court in respect to the effect of such withdrawal. The decision of the Court in the case of Chisholm v. Georgia, 2 Dallas, page 419, produced a proposal in Congress for amending the Constitution, which later became XI, as follows: "The judicial power of the United States shall not be construed to extend to any suit in law and equity commenced, or prosecuted, against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." Prior to the adoption of this amendment the power existed under the Constitution conferring jurisdiction upon the United States Court to try such actions. In Hollingsworth v. Virginia, 3 Dallas, page 378 (3 U.S. 299), the proposition was presented to the United States Supreme Court to determine whether the adoption of the amendment deprived the Court of jurisdiction to determine pending litigation. Argument in this case on behalf of the plaintiff was to the effect that the amendment should not be construed to interfere with pending litigation; that the amendment should not be given retrospective effect and thus withdraw jurisdiction in pending litigation; that it should follow rules of construction applicable to statutes or laws generally against such retrospective effect. The Attorney General, in behalf of the defendant, contended that the moment amendment XI became a part of the Constitution it thereupon deprived the United States Court of any power whatever to deal with litigation whether pending, or having arisen in the past, or to arise in the future. The case was disposed of in the following manner: "The Court on the day succeeding the argument delivered a unani-

15 mous opinion that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizens or subjects of any foreign states."

By analogy, although the principle appears the same, it seems perfectly clear that when amendment XVIII was repealed by the adoption of amendment XXI all power delegated by amendment XVIII ceased; that any legislation enacted pursuant to it termi-

nated the moment the amendment was repealed. It therefore follows that the national prohibition law has become obsolete and the power previously conferred upon the Courts to hear and determine cases involving the violation of that law has been effectually withdrawn from the courts and they are accordingly without any power whatever to proceed to trial or to impose sentences for the violation of a law no longer existing.

It is contended by the United States attorney that the Court still retains jurisdiction to hear and impose sentences upon convictions for a violation of the law which occurred prior to the repeal of the amendment. Chiefly he relies upon sec. 29, title I, of the U.S.C.A., Revised Statutes, sec. 13, act of 1871, by which it is provided that a repeal of a criminal statute, in the absence of language expressing a contrary intention, shall not deprive the courts of the power to convict and punish in violations which occurred before the repeal of such criminal statute. The Court is of the opinion that this statute has no application to the point presented here. The Prohibition Act is not terminated by any act of Congress; it becomes obsolete without repeal and therefore the point is not presented of a repeal by an act of Congress, bringing it within the construction of this statute.

In the second place, that section is one of construction, binding upon the courts in those cases only where Congress still retains the power to continue the criminal statute or to alter or amend it, and in no aspect of it, as this Court sees it, can such a statute operate to prolong the life of amendment XVIII, which the people themselves saw fit to terminate by repeal.

At common law, when a criminal statute was repealed, the courts had no power to inflict punishment against those who violated the law while it was in existence. A repeal operated to grant amnesty to the former violators. The rule was universally recognized "that no proceeding can be had or pursued under a repeal act of Parliament, though begun before the repeal, unless by special exception." Wm. Bl. 451. And by Hale P.C., 291, "that when an offense is made treason or felony by an act of Parliament, and then that act is repealed, the offense committed before such repeal and the proceedings thereupon are discharged by such repeal."

The repeal of a statute pending a prosecution for an offense which it creates arrests the prosecution and withdraws all authority to pronounce judgment, even after conviction. State v. Williams, 97 N.C. 352. The principle was recognized in all the States. 16 Corpus Juris 71.

An indictment cannot be sustained, under a statute which has been repealed, without any saving clause. United States v. Passmore, 4 Dallas 372. On repeal by an act of Congress all proceedings taken under it fall. "There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence." United States v. Tynen, 11 Wallace 89; 78 U.S. 88.

When the people saw fit to repeal the amendment they could have extended its operation until every violator of the law,
17 while it was in existence, had been brought to judgment and punished. But, for reasons satisfactory to Congress, it proposed amendment XXI, and thirty-six States have ratified it, without any such reservation or limitation, and the withdrawal of the amendment leaves Congress where it was before the amendment became a part of the Constitution, except section two of amendment XXI. This section does not empower Congress to prohibit the manufacture and sale of liquor, but prohibits the transportation or importation of beverage liquors into a State, in violation of its laws, for use therein. Hence, the Federal prohibition law can derive no vitality except such as is sanctioned through amendment XVIII, and now that the amendment is repealed, the law itself is inoperative and the court is without power to deal with anyone for its violation.

To adopt any other construction would result in prolonging the life of the amendment, and the laws existing thereunder, until every violator could be brought to justice and tried, thereby giving effect to the amendment and the National Prohibition Act long after the amendment had been repealed, and after the Prohibition Act itself had become obsolete. Moreover, it is difficult to see any advantage that could accrue in the administration of justice by the trial, conviction and punishment of citizens for violating a law that no longer exists. When a law has been terminated by the solemn act of the people, in the manner of the repeal of amendment XVIII, the courts would in my opinion, be engaged in an unwarranted procedure if they undertake to deprive citizens of their liberty in the name of such a law.

This December 6, 1933.

JOHNSON J. HAYES,
U.S. District Judge.

18 In United States District Court for the Middle District of North Carolina

No. 1999

UNITED STATES v. BYRUM GIBSON AND CLAUDE CHAMBERS

Order sustaining motions to dismiss filed December 6, 1933.

The defendant Chambers entered a plea of guilty at the last term of this court, being charged with violation of the National Prohibition Act. Prayer for judgment was continued until this term. At this term of the court the defendant Chambers files a plea in abatement and moves that the case be dismissed against him because the court has no authority in law to proceed with the trial.

The defendant Gibson also moves to dismiss the action against him because the court has no authority in law to proceed with the trial; that the indictment does not now state an offense of which the court has jurisdiction.

The motion of each defendant is sustained and the United States excepts, exception allowed, and gives notice in open court of its intention to appeal to the United States Supreme Court. The United States is allowed 15 days to prepare its bill of exceptions, and the defendants are allowed 5 days thereafter to file its exceptions thereto, and the term of this court is extended 25 days for the purpose of settling the bill of exceptions, and for making any other orders necessary.

This the 6th day of December 1933.

(Signed) JOHNSON J. HAYES,
United States District Judge.

19 In United States District Court

[Title omitted.]

Petition for appeal and order allowing same

Filed December 12, 1933

Comes now the United States of America, plaintiff in the above-entitled cause, by J. R. McCrary, United States attorney in and for the Middle District of North Carolina, and conceiving itself aggrieved by the ordered entered in this cause on December 6, 1933, dismissing the indictment on motion of defendants Byrum Gibson and Claude Chambers, prays that an appeal may be allowed from said order to the Supreme Court of the United States, and in connection with this petition the United States presents herewith its assignment of errors and statement of jurisdiction.

Dated December 12th, 1933.

UNITED STATES OF AMERICA,
By its attorney: J. R. MCCRARY,
United States Attorney.

Appeal allowed this 12th day of December 1933.

JOHNSON J. HAYES,
United States District Judge.

20 In United States District Court

[Title omitted.]

Assignment of errors

Filed December 12, 1933

Comes now the United States of America, by J. R. McCrary, United States attorney in and for the Middle District of North Carolina, and in connection with its appeal makes the following assignment of errors:

1. The District Court erred in sustaining the motions of the defendants Byrum Gibson and Claude Chambers in the above-entitled cause.

2. The District Court erred in dismissing the indictment upon motion of the defendants Byrum Gibson and Claude Chambers.

3. The District Court erred in holding that it had no power to try the defendants Byrum Gibson and Claude Chambers for the violations of law charged in the indictment.

4. The District Court erred in holding that the repeal of the eighteenth amendment to the Constitution of the United States by the Twenty-first Amendment thereof had the effect of releasing and extinguishing all penalties and criminal liabilities incurred under the National Prohibition Act, as amended and supplemented.

Dated December 12th, 1933.

UNITED STATES OF AMERICA,
By its attorney: J. R. McCRARY,
United States Attorney.

21 [*Citations in usual form showing service on Walser & Casey, filed Dec. 12, 1933, omitted in printing.*]

23 In United States District Court

[Title omitted.]

Order as to transcript of record

Filed December 12, 1933

By consent of Walser and Casey, attorneys for the appellees, and J. R. McCrary, United States attorney, attorney for the appellant.

It is ordered that the following shall constitute the record on appeal:

Bill of indictment.
Transcript of entries in the clerk's office subsequent to the indictment.
Arraignment of defendants.
Plea and motion of the defendants.
Opinion of the court and order of the court on motions.
Exception by attorney for United States, exception allowed.
Petition for appeal.
Allowance of appeal.
Statement of jurisdiction by Solicitor General.
Assignment of errors.
Citation to defendants and service of same.
Waiver of right of opposition of jurisdiction by the defendant.
This the 12th day of December 1933.

(Signed) JOHNSON J. HAYES,
United States District Judge.

Consented to:
J. R. McCRARY,
Counsel for Appellant.
WALSER & CASEY,
Counsel for Appellee.

24 In United States District Court

[Title omitted.]

Order settling case

The foregoing case on appeal has been consented to by the defendants through their attorneys, Walser and Casey, and by J. R. McCrary, United States attorney, and has been examined and approved and settled by the Court as constituting the case on appeal.

This the 14th day of December 1933.

JOHNSON J. HAYES,
Judge of the United States District Court
for the Middle District of North Carolina.

25 In United States District Court

[Title omitted.]

Order to transmit record

It is ordered by the Court that a transcript of the record and the proceedings in the cause aforesaid, together with all things thereto relating be transmitted to the Supreme Court of the United States.

This the 14th day of December, 1933.

JOHNSON J. HAG,
Judge of the United States District Court
for the Middle District of North Carolina.

26 [*Clerk's Certificate to foregoing transcript omitted in printing.*]

27 In Supreme Court of the United States

Statement of points relied upon and designation of entire record for printing

Filed December 15, 1933

Pursuant to rule 13 of this Court appellant specifies the following points upon which it intends to rely in the above-entitled cause:

1. The District Court erred in sustaining the motions of the defendants Byrum Gibson and Claude Chambers in the above-entitled cause.

2. The District Court erred in dismissing the indictment upon motion of the defendants Byrum Gibson and Claude Chambers.

3. The District Court erred in holding that it had no power to try the defendants Byrum Gibson and Claude Chambers for the violations of law charged in the indictment.

28 4. The District Court erred in holding that the repeal of the eighteenth amendment to the Constitution of the United States by the twenty-first amendment thereof had the effect of releasing and extinguishing all penalties and criminal liabilities in-

curred under the National Prohibition Act, as amended and supplemented.

The appellant deems the entire record, as filed, to be necessary for the consideration of the above contentions.

J. CRAWFORD BIGGS,
Solicitor General.

DECEMBER 15, 1933.

[File endorsement omitted.]

(Endorsement on cover:) File No. 38, 262, M. North Carolina, D.C.U.S. Term No. 659. The United States of America, Appellant, vs. Claude Chambers and Byrum Gibson. Filed December 15, 1933. File No. 659 O.T. 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. ——

THE UNITED STATES OF AMERICA, APPELLANT

v.

BYRUM GIBSON AND CLAUDE CHAMBERS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

STATEMENT OF JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, appellant submits herewith its statement showing the basis of the jurisdiction of this Court to entertain the appeal in the above-entitled cause:

A

STATUTES

The statutory jurisdiction of this Court to review by direct appeal the order here complained of is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U.S.C., Title 18, Sec. 682), otherwise known as the Criminal Appeals Act, and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938 (U.S.C., Title 28, Sec. 345).

26643—33

B

DATES OF ORDER AND APPLICATION FOR APPEAL

The order of the District Court was entered December 6, 1933. An application for appeal was filed December 12, 1933, and allowed December 12, 1933.

C

NATURE OF THE CASE

One count of the indictment in this case was based upon Section 37 of the Criminal Code (U.S.C., Title 18, Sec. 88) and charged a conspiracy to manufacture, possess, sell and transport intoxicating liquor in violation of the National Prohibition Act.

The other counts of the indictment were based upon Section 3, Title II of the National Prohibition Act, c. 85, 41 Stat. 305, 308 (U.S.C., Title 27, Sec. 12), as amended and supplemented, c. 29, 46 Stat. 1036 (U.S.C. Supp. VI, Title 27, Sec. 91), and charged in separate counts the unlawful transportation and possession of intoxicating liquor, it being further alleged that each of said defendants named had theretofore been convicted of similar offenses and that this was the second offense of the same kind committed by each of them.

The defendant Claude Chambers on December 6, 1933, after a plea of guilty, filed what he termed a "plea in abatement", in which he objected to the court entering any judgment in the case for the reason:

> That Amendment No. 18 of the Constitution of the United States of America and all laws passed in conformity therewith have been repealed and there is no law of the United States of America constituting the allegations of the indictment herein, to which this defendant has pleaded guilty, a crime for which there is prescribed by the law any punishment, and that the Court has no jurisdiction to proceed to judgment and that the defendant be discharged.

The defendant Byrum Gibson on December 6, 1933, demurred to the indictment on the ground:

> That the indictment does not set forth facts which constitute a crime under the Constitution and the Statutes of the United States of America in that the 18th Amendment of the Constitution and the Statutes passed by the Congress of the United States have been repealed and that the allegations of the said indictment do not constitute a crime against the laws of the United States of America, and that this Court has no jurisdiction to proceed to trial and that this indictment be dismissed.

On December 6, 1933, the District Court dismissed the indictment, treating the defendants' pleadings as motions to dismiss. In an opinion rendered at the same time the court held that it now had no power to hear and determine cases involving the violation of the National Prohibition Act as amended and supplemented or to impose sentences for violations of such Act, for the reason

that the repeal of the Eighteenth Amendment to the Constitution of the United States by the adoption of the Twenty-first Amendment of the Constitution deprived the National Prohibition Act and its amendments and supplements of any further force and effect, and had the effect of releasing and extinguishing all penalties and criminal liabilities incurred thereunder.

D

CASES SUSTAINING JURISDICTION

In this case, the action of the District Court in dismissing the indictment is clearly based upon the invalidity of the statute upon which the indictment was founded. While the plea of the defendant Chambers was entitled a "Plea in Abatement", the record shows that prior to the time it was filed the defendant had pleaded guilty, and that the purpose of his plea was to arrest the judgment which the court would ordinarily have entered upon his plea of guilty. It is, therefore, submitted that jurisdiction of this appeal may, insofar as the defendant Chambers is concerned, be sustained under the third paragraph of the Criminal Appeals Act, which permits a direct appeal to this Court from "a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded." We also think that jurisdiction of the appeal may, so far as Chambers is concerned, be sustained upon

the ground that it was a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." The contents of the plea shows that it sought, not merely an abatement of the indictment, but a complete bar to any further proceedings for the offense charged. Cf. *United States* v. *Storrs,* 272 U.S. 652, 654. See *United States* v. *Goldman,* 277 U.S. 229, 236; *United States* v. *Thompson,* 251 U.S. 407; *United States* v. *Oppenheimer,* 242 U.S. 85; *United States* v. *Celeatine,* 215 U.S. 278; *United States* v. *Murdock,* 284 U.S. 141.

The District Court's decision sustaining the demurrer of the defendant Byrum Gibson and dismissing the indictment as to him is reviewable under the second paragraph of the Criminal Appeals Act, which permits a direct appeal "from a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded." See also *United States* v. *Sprague,* 282 U.S. 716.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

DECEMBER, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —

THE UNITED STATES OF AMERICA, APPELLANT

v.

BYRUM GIBSON AND CLAUDE CHAMBERS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MOTION TO ADVANCE

Now comes the Solicitor General and moves that the Court advance the above-entitled cause for hearing during the January session of the Court.

The question involved is whether the District Court, after the repeal of the Eighteenth Amendment to the Constitution of the United States by the adoption of the Twenty-first Amendment, had power to hear and determine cases involving, or to impose sentences for, violations of the National Prohibition Act and for conspiracies to violate the National Prohibition Act under Section 37 of the

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Criminal Code; or whether the repeal of the Eighteenth Amendment had the effect of releasing and extinguishing all penalties and criminal liabilities incurred under the National Prohibition Act, as amended and supplemented, or incurred under Section 37 of the Criminal Code by conspiring to violate the National Prohibition Act, as amended and supplemented.

After repeal of the Eighteenth Amendment to the Constitution of the United States, there remained pending on the dockets of the District Courts throughout the country a large number of indictments which charged both substantive violations of the National Prohibition Act and conspiracies to violate the National Prohibition Act. United States Attorneys seek advice concerning the disposition of such cases; and the Department is without judicial precedent to guide it under circumstances such as those attendant upon the repeal of an Amendment to the Constitution of the United States. An early hearing of this case will greatly facilitate the Department in a prompt disposal of the many pending cases, either by trial or by dismissal, as the law of this case may warrant.

Furthermore, the appeal in this case was taken by the United States under the Criminal Appeals Act, c. 2564, 34 Stat. 1246 (U.S.C., Title 18, Sec. 682), which provides that an appeal in the class of cases covered by that statute "shall be diligently

prosecuted and shall have precedence over all other cases."

Opposing counsel has been notified of this motion.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

DECEMBER, 1933.

U. S. GOVERNMENT PRINTING OFFICE 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 659

THE UNITED STATES OF AMERICA, APPELLANT

v.

BYRUM GIBSON AND CLAUDE CHAMBERS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 7) has not yet been reported.

JURISDICTION

The judgment to be reviewed was entered December 6, 1933 (R. 10), and the petition for appeal to this Court was allowed December 12, 1933 (R. 11). The jurisdiction of this Court rests upon the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U.S.C., Title 18, Sec. 682), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The single question presented is whether the repeal of the Eighteenth Amendment had the effect of re-

leasing and extinguishing all criminal liabilities incurred under the National Prohibition Act, or incurred under Section 37 of the Criminal Code by conspiring to violate the National Prohibition Act, where the criminal liabilities had been incurred before the ratification of the Twenty-first Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Article XXI of the Amendments to the Constitution was ratified on December 5, 1933, and provides:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled* (*two-thirds of each House concurring therein*), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by conventions in three-fourths of the several States:
>
> "ARTICLE —
>
> "SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> "SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
>
> "SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitu-

> tion, within seven years from the date of the submission hereof to the States by the Congress."

Section 13 of the Revised Statutes (U.S.C., Title 1, Sec. 29) provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

STATEMENT

The appellees were indicted in the District Court of the United States for the Middle District of North Carolina for conspiring to violate the National Prohibition Act and for transportation and possession of intoxicating liquor in violation of the National Prohibition Act. (R. 2.) The indictment was returned in June, 1933. (R. 5.) On December 6, 1933, the appellee Claude Chambers (who had theretofore entered a plea of guilty, R. 6) filed what he termed a "plea in abatement" in which he objected to the entry of any judgment against him for the reason that, since the repeal of the Eighteenth Amendment, the court had no jurisdiction to proceed further in the case. On the same date, the appellee Byrum Gibson demurred to the pending indictment upon the same grounds. (R. 6.) The trial court thereupon dismissed the indictment. (R. 10.)

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In dismissing the indictment.

(2) In holding that the repeal of the Eighteenth Amendment to the Constitution of the United States by the adoption of the Twenty-first Amendment had the effect of releasing and extinguishing all penalties and criminal liabilities incurred under the National Prohibition Act, as amended and supplemented.

ARGUMENT

I

THE EFFECT OF THE DECISION OF THE LOWER COURT ON THIS QUESTION IS FAR-REACHING

Since December 5, 1933—the effective date of the Twenty-first Amendment—four lower Federal courts, in addition to the court below, have passed on the question here involved. The Circuit Court of Appeals for the Ninth Circuit in *Green* v. *United States* (unreported)[1] and Judge Gibson in the Western District of Pennsylvania in *United States* v. *Oliver* (unreported)[1] have held that there is no longer any power to punish for past violations of the National Prohibition Act. On the other hand, Judge Atwell in the Northern District of Texas and Judge Baker in the Northern District of West Virginia have held to the contrary though no written opinions were rendered.

It was the rule of the common law that if a statute expired or was repealed, before final judgment had been rendered, the court was deprived of power to

[1] Photostatic copies of these two opinions are presented.

proceed to judgment in pending criminal cases, unless there was a saving clause in the law.

This rule of construction was laid down by Chief Justice Marshall in the case of *General Pinkney*, 5 Cranch 281, in the following terms:

> * * * it has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute.

In consequence of this rule of construction, Congress passed in 1871, Section 13 of the Revised Statutes (U.S.C., Title 1, Sec. 29). This is a general saving clause applicable to all legislation, unless the repealing legislation expressly provides to the contrary.

This rule of construction absolutely reversed the rule of the common law.

In the case of *United States* v. *Ulrici*, 3 Dillon 532, in an opinion rendered by Mr. Justice Miller of the Supreme Court, who was assigned to the Eighth Circuit, he said:

> * * * the 13th section of the Revised Statutes contains a general provision changing, as I conceive, the rule of the common law, that a statute modifying the punishment of a crime prescribed by a prior law operates as a repeal of that law. There is no doubt that that general proposition is sound.
>
> Any statute that varies the definition or the punishment of an offence abrogates the former

> statute; and no offences committed under it can, by a well-known principle of the law, be punished, unless the later act contains a saving clause. But, as I remarked, the Revised Statutes changed this rule of the common law. They were intended to change it, and it is only the extent of the change which is here questioned.

The *Ulrici* case was cited with approval in *United States* v. *Reisinger*, 128 U.S. 398, 402.

Though it was said to be a rule "settled on general principle," the rule developed "many a lame and impotent conclusion in criminal cases, in which the defendant escaped punishment because the legislature, in the hurry and confusion of amending and enacting statutes, had forgotten to insert a clause to save offenses and liabilities already committed or incurred from the effect of express or implied repeal." (*United States* v. *Barr*, 4 Sawyer 254, 257.)

In repealing the Eighteenth Amendment, the Twenty-first Amendment had the effect of repealing the National Prohibition Act. And the courts which have rendered opinions on the question here involved have accordingly treated the Twenty-first Amendment as though it were subject to the strict common law rule of construction. In applying this rule they have, however, become confused by the constitutional phase of the case; have mixed statutes with principles; have failed to apply principles of construction to a constitutional amendment because those principles, in addition to being principles, happened also to be embodied in statute.

As "the serious consequence sometimes incident to this common-law rule of construction" (*Hertz* v. *Woodman*, 218 U.S. 205, 216) was not considered by these courts, some of them should be indicated. The rule, if applicable, would seem to cover all pending cases, both those pending in the trial courts and those now in the appellate courts. As this Court said in *Gulf, Col. & Santa Fe Ry.* v. *Dennis*, 224 U.S. 503, 506, it even "requires the reversal of a judgment which was right when rendered." The *Green* case in the Ninth Circuit was an instance of dismissal by an appellate court. In the court below, conspiracies punishable under Section 37 of the Criminal Code were affected by the rule. Indeed, the application of the rule amounts to what this Court referred to in *Pickett* v. *United States*, 216 U.S. 456, 459, as an "automatic amnesty for crimes." Since the rule applied is merely one of construction, it should yield if legal principles permit the adoption of a different rule of construction.

II

DECISIONS INTERPRETING THE ELEVENTH AMENDMENT ARE NOT APPLICABLE

The precise question here involved has never been passed upon by this Court. However, the court below stressed the decision of this Court in *Hollingsworth* v. *Virginia*, 3 Dall. 378, which held that the adoption of the Eleventh Amendment affected all cases, past as well as future. But we submit that the case is readily distinguishable due to the marked precision with which the Eleventh Amendment was framed.

The language of that Amendment is that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, *commenced or prosecuted* against one of the United States by citizens of another State or by citizens or subjects of any foreign state." (Emphasis ours.) After the adoption of this Amendment, the question was submitted in the *Hollingsworth* case whether the Amendment did, or did not, supersede all suits pending as well as prevent the institution of new ones of the prohibited class. For the negative it was argued that, though the words "commenced or prosecuted" were properly in the past tense, they ought not to be so grammatically restricted; but the words should be construed to apply only to suits to be "commenced or prosecuted"; that such construction would avoid an *ex post facto* effect, and that pending suits would be saved. During the presentation of this argument, however, Mr. Justice Chase interrupted to say (p. 379): "The words 'commenced or prosecuted,' standing alone, would embrace cases both past and future." Obviously, when, on the succeeding day, this Court unanimously decided that the Eleventh Amendment affected any case, past or future, it felt bound by the words "commenc*ed* and prosecut*ed*." As stated later, in *Hans* v. *Louisiana*, 134 U. S. 1, 11, 12, the Eleventh Amendment "reversed the decision of the Supreme Court" in *Chisholm* v. *Georgia*, 2 Dall. 419.

Chisholm v. *Georgia*, and other cases like it, were actually pending at the time of the adoption of the

Eleventh Amendment for they were "swept at once from the records of the court" after the decision in *Hollingsworth* v. *Virginia*.[2] There was, therefore, reason why the Eleventh Amendment should expressly refer to "commenced," or pending, cases. But where the Eleventh Amendment expressly superseded all cases "commenced," the Twenty-first Amendment not only contains no such limitation but is entirely silent upon the matter.

III

DECISIONS INVOLVING CHANGES FROM TERRITORIAL TO STATE GOVERNMENTS INDICATE THAT THE COURTS STILL HAVE POWER OVER NATIONAL PROHIBITION ACT VIOLATIONS

The Twenty-first Amendment involved, in effect, a transfer of power to the States by the Federal Government. In this, the present situation is comparable to that which arose when Territories, which had been subject to Federal control, entered the Union as States.

For that reason, *United States* v. *Baum*, 74 Fed. 43, is much like the case at bar. On November 21, 1895, Baum was indicted in the District Court of the then Territory of Utah, for adultery committed on the 25th day of September, 1895, in said Territory. The indictment was pending in such District Court when Utah became a State on January 4, 1896 (29 Stat. 876). The crime of adultery was defined by the Act of Congress of March 3, 1887, commonly known as the "Edmunds-Tucker Act," and was by that Act

[2] See footnote in 2 Dall. 479.

made a crime not only in the Territories, but in any other place of which the United States had exclusive jurisdiction.

After Utah was admitted to the Union, the indictment was transferred to the United States Circuit Court of Utah. There Baum moved for a dismissal on the ground that the law under which he was indicted ceased to operate when Utah was admitted as a State, or as stated in the motion "was repealed by the admission of Utah to statehood," and that there was no law of the United States in force in Utah making the act charged against him a crime, or authorizing its punishment. The trial took place in the United States Circuit Court on April 6, 1896.

The Utah Enabling Act and the ordinance adopted by its authority made the United States Circuit Court the successor of the territorial court as to this case, and process initiating in the latter court could be proceeded with in the United States Circuit Court, provided there was authority to punish the defendant for the crime charged. The court said:

> But it is contended that the power to punish in this case has ceased, because Utah was admitted as a state on the same footing as the other states, and, as claimed, the United States is without constitutional power to make criminal the act charged in the indictment, if now committed in Utah; and hence it has lost the power to punish the defendant for it. If the act would not constitute a crime against the United States if now committed, it would not follow that the power to punish it was lost.

There seems to be no objection, in principle, to punishing under a statute which makes an act criminal when committed within a particular time, although such punishment be not inflicted until the expiration of that time. *Stevens* v. *Dimond*, 6 N.H. 330; Bish. St. Crimes, Sect. 182. It is true that no punishment can be inflicted for an act after the repeal, without a saving clause, of the law prohibiting it and prescribing its punishment; but this is because there would remain no law in existence authorizing the court to proceed. * * *

This is as true of repeals by implication, as of other repeals, but it is not necessary that the act charged as criminal should continue to be prohibited. The crime is complete as of the date of the criminal act, and, unless there be a remission, by the repeal of the only law which authorizes its punishment, or by direct pardon, such punishment may be inflicted. This is shown by the admittedly valid statutes of the United States, and of most of the states, to the effect that such a repeal in criminal cases should not affect causes of prosecution already accrued. Rev. Stat. U.S. Sec. 13. Wherever there is such general saving clause, or a similar special saving clause in the repealing act, the authority to punish is still preserved, and the intent, otherwise inferable, that the repeal should operate as a remission of past offenses, is negatived.

But it is said that Congress had no constitutional power to save the right to punish this offense after Utah became a state, unless

it had the power to make the act criminal if thereafter committed in Utah. No authority is cited in support of this claim, and I have been able to find none. It is predicated upon the theory that, in order to punish a crime against its laws, the United States must retain its sovereignty over the place where the crime was committed, in respect to the subject matter of the crime. * * *

Having the constitutional power to prohibit the act and prescribe a punishment, the United States retains the power to inflict such punishment, independent of the continued exercise of absolute, or, indeed, of limited, sovereignty over the place of the commission of the offense. The jurisdiction of consular courts of the United States rests on this principle. Having the power to prescribe the offense, Congress had the power to authorize the punishment of the offender at such time or place as it might designate, within or without a state; so that, if it be admitted that the law under which this indictment was found has been repealed by implication, with respect to Utah, still the power to punish past offenses under it is saved both by the express language of section 13, Rev. St. U.S., and by the intent to save pending prosecutions shown in section 17 of the Utah enabling act.

In the *Baum* case, Congress had full power and authority to enact the statute making adultery a crime in the Territory of Utah. Prior to the admission of Utah into the Union, the defendant violated the statute and was indicted in the territorial court

of Utah, but before trial, and while the case was pending, Utah was admitted into the Union. The admission of Utah to statehood was by the joint action of Congress and the people of Utah as, in the instant case, the repeal of the Eighteenth Amendment was by the joint act of Congress and the people of the United States. By the admission of Utah, the criminal jurisdiction of Congress over the territory embracing the new State was completely destroyed except as to such territory in the new State within the exclusive jurisdiction of the United States.

So by the ratification of the Twenty-first Amendment, the power of Congress to legislate as to the sale of intoxicating liquors in North Carolina was destroyed, except as reserved in the Amendment.

Baum contended that as Congress had no power after the admission of Utah to statehood to enact a statute making criminal adultery committed in that State, the court could not after the admission punish him for a violation of the statute committed prior to the admission, as the power of Congress to enact such a statute was taken away. But the court held that under Section 13 of the Revised Statutes, the saving statute, the right to proceed to judgment was saved.

So in the case at bar, the ~~Government~~ Defendants contends that as Congress after the repeal of the Eighteenth Amendment has no power to enact a statute making criminal the sale of intoxicating liquors in North Carolina, the court cannot, after the repeal, punish them for an offense, in violation of the statute, committed before the repeal. But as was said in the *Baum* case, the

power to punish past offenses is saved by the express language of Section 13 of the Revised Statutes, which has remained in full force and effect since 1871.

This Court in *Pickett* v. *United States*, 216 U. S. 456, 459, cited with approval the "elaborately considered" opinion in the *Baum* case.

In the *Pickett* case, the defendant, a negro, was indicted in the United States District Court for the Western District of Oklahoma, for the murder of a negro within the limits of an Indian Reservation. The murder was charged as having been committed on October 14, 1907. The State of Oklahoma was admitted to the Union on November 16, 1907. The offense was, therefore, committed before its admission as a State, and the defendant was after such admission indicted and convicted of a capital offense in a United States court for the Western District of the State of Oklahoma.

After the murder was committed, but before the defendant was indicted, Oklahoma had been admitted into the Union. The law was settled that the admission of a State into the Union destroyed the former Federal jurisdiction over Indian Country included in the new State and withdrew from the United States and Congress, and conferred upon the State, the exclusive control and jurisdiction of offenses committed by a person not of Indian blood against a person not of Indian blood. *United States* v. *McBratney*, 104 U.S. 621; *Draper* v. *United States*, 164 U.S. 240.

So that after the admission of Oklahoma into the Union, the power of Congress to enact a law punishing

the crime of murder committed by a negro against a negro was at an end, and at the time the defendant was tried and convicted for murder, Congress was stripped of its power and jurisdiction over this crime in that country. Yet a conviction for the capital offense of murder, committed while the law was in force, was upheld by this Court. "The jurisdiction of the Court was challenged by motion to quash, by demurrer and by motion in arrest of judgment." This Court held that it was competent for Congress to provide as it did in the Fourteenth Section of the Enabling Act for the transfer of jurisdiction to the Federal courts created in the new State, and that the power to punish was not lost—citing the elaborately considered decision in *United States* v. *Baum, supra.*

Moore v. *United States*, 85 Fed. 465 (C.C.A. 8th), also a territorial case, is apparently principally relied upon by the Circuit Court of Appeals in the *Green* case, as that court quoted nearly two pages from this opinion.

It is apparent from a reading of the excerpts quoted that it is not an authority for the position taken by that court. After quoting Section 13 of the Revised Statutes, the court in the *Moore* case said (p. 470):

> It is clear from the language of the section that it applies only to cases where the statute defining an offense has been *repealed. The act of July 2d was not repealed* by the enabling act, for it yet applies to the territories of the United States. [Italics ours.]

The saving clause only applies "where the statute defining an offense has been repealed," and the court held that the statute involved in that case had not been repealed. The court held that the Federal District Court of Utah did not have power to try an indictment found in the territorial court before Utah became a State, because "no such power has been bestowed upon it by any special legislation." (P. 471.)

The Circuit Court of Appeals in the *Green* case also greatly relied upon the case of *City of Sonora* v. *Curtin*, 137 Cal. 583, 589. It quotes the following from that opinion:

> The authority under which the ordinance for revenue purposes was passed being repealed, the ordinance is repealed as to all such purposes, and must be regarded as if it never existed, except for the purposes of those actions which were commenced, prosecuted, and concluded while it was an existing law. * * *
>
> In such case the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause.

We do not controvert these principles of law unless it is contended that the repealing statute itself must contain the saving clause. The law is settled that the saving clause may be in a general statute, as is Section 13 of the Revised Statutes.

IV

THE COURT BELOW SHOULD NOT HAVE APPLIED THE COMMON-LAW RULE TO THE TWENTY-FIRST AMENDMENT, AS SUCH RULE IS OPPOSED TO PRESENT PUBLIC POLICY, BUT IT SHOULD HAVE APPLIED THE PRINCIPLES OF THE STATUTORY RULE

This Court has said that the Constitution must be "interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 654. Since the first ten Amendments embody guarantees and immunities inherited from our English ancestors, they are to be interpreted in a like manner. Cf. *Robertson* v. *Baldwin*, 165 U.S. 275, 281. Clearly, this Court has always sought and applied those principles of law which were familiar and *controlling at the time* the constitutional provision, or Amendment, in question was adopted.

What principle of law governing the effect of repeals was most familiar and most controlling throughout the United States in 1933 when the Twenty-first Amendment was adopted?

The Ninth Circuit Court of Appeals has said (p. 10):

> The constitutional amendment (Amendment XXI) contains no saving clause and Congress is powerless to enact one, either before or after the repeal, hence the general rule is applicable with reference to the effect of a repeal of a penal statute on pending cases.

The "general rule" which the court applied was the old common-law rule abrogated in American jurisprudence.

There is no reason, we submit, why the courts should resurrect this dead rule and apply it, rather than apply the living statutory rule of construction which obtains in the Federal and state courts.

In Goldberg v. *United States*, 280 Fed. 89 (C.C.A. 5th), certiorari denied, 260 U.S. 728, the effect of Section 13 of the Revised Statutes upon the repeal of the statute arising from the adoption of the Eighteenth Amendment was considered. The court held (pp. 89–90):

> One who had committed the offense of selling intoxicating liquors without having paid the special tax required of retail liquor dealers, prior to the adoption of the Eighteenth Amendment and the enactment of the National Prohibition Act, can be tried and punished for that offense after national prohibition took effect, under Rev. St. Section 13, providing that the repeal of any statute shall not have the effect to release any penalty unless the repealing act shall expressly so declare. [Syllabus.]

The court said (p. 91):

> The War Prohibition Act was not intended to repeal the general provisions of law for the collection of internal revenue, and none of those provisions were intended to be or were repealed, superseded or supplanted until the Eighteenth Amendment and the National

Prohibition Act (41 Stat. 305) became effective.

Inasmuch as the trial occurred after the effective date of the amendment and the National Prohibition Act, it is also contended that either the amendment or the last-mentioned act repealed the revenue provisions of the Revised Statutes and the War Prohibition Act, and that therefore, although it was a violation of the law to engage in the business of a retail liquor dealer at the time the indictment was found, punishment could not be imposed, because of the repeal before trial. This contention is untenable, in view of section 13, Revised Statutes, which provides that the repeal of any statute shall not have the effect to release any penalty, forfeiture, or liability unless the repealing act shall expressly so declare. There is no such declaration in the National Prohibition Act.

Historically, one of the last pronouncements of the common law rule—that after repeal without a saving clause, no further proceedings can be had under the Act repealed—came from this Court in 1870 in *United States* v. *Tynen*, 11 Wall. 88. Thereupon Congress promptly passed "An Act prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof" (Act approved February 25, 1871, c. 71, 16 Stat. 431) which is now Sec. 13, Revised Statutes (U.S.C., Title I, Sec. 29). The prior rule of construction was there changed and, as changed, has remained for the past sixty-two years

as a strong protest in Federal jurisprudence against the old order.

It is a most wholesome and salutary rule of construction which superseded the archaic rule of the common law in the Federal courts a few years after the Civil War and has been enforced consistently since that time. *United States* v. *Barr*, 4 Sawyer 254, called it "a salutary provision."

Why should the courts be powerless to punish for crimes committed under a valid criminal law, merely because for satisfactory reasons the statute has been repealed?

There is no difference in principle between the repeal of a statute by statutory enactment and by a constitutional enactment; both are done by Congress, but the latter is not effective until approved by three-fourths of the States. One is passed by Congress while the other is proposed by Congress and adopted by three-fourths of the States. Obviously, the intent of the framers is, in either case, the same. Then why should there be one rule of construction for that repeal which is passed by Congress while a different rule controls that which is merely proposed by Congress?

Under either method of repeal, the statute is a dead letter after the repeal, and if the courts have power to punish for offenses committed before the repeal when the repeal is by statutory enactment, the courts have equal power to punish for like offenses when the repeal is by constitutional provision.

If Congress had seen fit to repeal the Volstead Act before it adjourned last June, no one would contend

that the courts would have been powerless to punish for offenses committed between the repeal and the ratification of the Twenty-first Amendment in December, but it would be contended that after the ratification of the Twenty-first Amendment, the courts were thereafter impotent because the Eighteenth Amendment was repealed, and as Congress had passed the Volstead Act pursuant to power conferred by the Eighteenth Amendment, that power was withdrawn, and if the Volstead Act had still been in force, it would have been repealed by implication and would thereby have expired and become dead as a law. Had Congress, however, repealed the Volstead Act before the ratification of the Twenty-first Amendment, that Amendment would not have repealed the Volstead Act—it would not have affected the *status quo*, except to take away from Congress the power to reenact the Volstead law or similar legislation; but Congress is not now attempting to do this and we submit that the established statutory rule of construction must obtain and be applied rather than the discarded common law rule.

In denying the applicability of Section 13 of the Revised Statutes, the court below said:

> The Prohibition Act is not terminated by any act of Congress; it becomes obsolete without repeal and therefore the point is not presented of a repeal by an act of Congress; bringing it within the construction of this statute.

The Circuit Court of Appeals in *Green* v. *United States*, unlike the court below, held that the effect of

the adoption of the Twenty-first Amendment was to repeal the National Prohibition Act, citing authorities to sustain its holding that—

> An amendment of a state constitution which is inconsistent with existing legislation repeals such legislation. [Citing many cases.]

With this statement of the law the Government agrees.

But it does not agree with the court below that there is no occasion for bringing in the rule of construction unless there has been express repeal by statute. When the common law rule of construction was applicable to statutes, Chief Justice Marshall, in *General Pinkney*, 5 Cranch 281, said that it applied "after the expiration or repeal of a law." If the common law rule was then applicable to repeal, express or implied, the statutory rule of construction should now be applicable to both.

It is only necessary that the old statute be repealed in order to make effective Section 13, Revised Statutes, unless otherwise provided in the repealing Act. The cases establish the principle that repeal may be by an express repeal by statute, or it may be by implication by the enactment of a statute inconsistent with the old statute, or it may be a repeal by implication by a constitutional amendment which is inconsistent with the old statute or by withdrawing from the legislative arm of the Government the power to enact the old statute, as in this case, or it may be by an enactment creating a new State whereby

the authority of Congress to make acts criminal in the jurisdiction of the new State is taken away.

In whatever way the old statute is repealed, the saving clause becomes operative unless express provision inconsistent therewith is contained in the repealing law, and this irrespective of whether the repealing law is by way of statutory or constitutional enactment. For in either way the old statute becomes a dead letter, and to this situation the rule of construction embodied in the Federal statute attaches.

As pointed out in *Great Northern Railway Co.* v. *United States*, 208 U.S. 452, 465, "This provision but embodies Section 4 of the Act approved February 25, 1871, c. 71, 16 Stat. 431, which was entitled 'An Act prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and rules for the construction thereof.' As the section of the Revised Statutes in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment. But while this is true the provisions of Section 13 are to be treated as if incorporated in and as a part of subsequent enactments, and therefore under the general principles of construction requiring, if possible, that effect be given to all the parts of a law the section must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of Section 13."

The law which struck down and repealed the statute under which the respondents were indicted was the Constitutional enactment, and this enactment of Congress, approved by the requisite number of States, became the supreme law of the land—a repealing Act of the highest dignity. We submit that it cannot be successfully contended that considering this law as a whole "the legislative mind will be set at naught by giving effect to the provisions of Section 13."

The rule of construction contained in Section 13 of the Revised Statutes has become firmly entrenched in judicial decisions. Indeed, the modern "trend" was noted in *Hertz* v. *Woodman*, 218 U.S. 205, 216, where this Court said:

> There has been a marked legislative trend in the direction of escaping from the serious consequence sometimes incident to this common-law rule of construction, indicated by general statutes saving liabilities, penalties and forfeitures incurred under repealed statutes. Such a general statute was passed by Congress on February 25, 1871, ch. 71, 16 Stat. 431, the fourth section of which was carried into the revision of 1878 and is now in force as Section 13, Rev. Stat. * * *
>
> This provision has been upheld by this court as a rule of construction applicable, when not otherwise provided, as a general saving clause to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress. *United States* v. *Reisinger*, 128 U.S. 398; *Great Northern Ry. Co.* v. *United States*, 208 U.S. 452.

Section 13 of the Revised Statutes evidenced the public policy of the Federal Government on the effect of any "repealing act." The saving clause was in full force and effect when the Twenty-first Amendment was passed by Congress for submission to the States. It was unquestionably well known, therefore, to the Congress which proposed the Twenty-first Amendment. Its principles—rather than those of the common law—should, therefore, be applied as a rule of construction to the Amendment.

This Amendment was framed by Congress, passed as a joint resolution by both Houses, and by them submitted to the States. Had Congress intended to reverse its own long established policy and rule of construction, it would have inserted in the Amendment which it drafted and submitted to the States a provision that the ratification of the Amendment should release any liability incurred under the National Prohibition Act passed pursuant to the Eighteenth Amendment, but it did not see fit to do so.

The rule of construction thus laid down by the Federal statute was like similar rules in a number of States, and later statutes to the same effect have been enacted in many of the other States. Statutory provisions from forty-three States, which differ somewhat in phraseology have been set forth at length in an appendix to this brief. Canada [3] and England [4] have similar provisions.

[3] For Canada, see Revised Statutes, 1927, c. 1, Sec. 19.

[4] In England, see Interpretation Act, 1889, 52 and 53 Vict., c. 63, Sec. 38.

The statutes of these States show that in the year 1933, when the Twenty-first Amendment was proposed by two-thirds of each House of Congress, and adopted by conventions in three-fourths of the States, the almost universal rule throughout the United States was that the repeal of a criminal law did not debar prosecution for crimes committed before its adoption. These statutes—and not the common law—declare the principles known among the States by which the Twenty-first Amendment was adopted. It is submitted that the repealing provisions of the Twenty-first Amendment should be construed in the light of this almost universal rule.

If this modern rule of construction is applied, then Section 13 of the Revised Statutes has the effect of permitting violations of the National Prohibition Act committed while the Act was in full force and effect to be punished under the same principle as if the repeal had been by statutory enactment rather than by constitutional Amendment.

The *Green* case conceded that although Congress had not the power to enact the prohibition law after the repeal of the Eighteenth Amendment, yet power could have been given the courts to punish in pending cases. In that case, however, it was pointed out that the plan pursued by Congress did not have this effect because it did not insert such a provision in the Amendment itself. The general law in force when Congress submitted the Amendment provided that pending cases were saved unless the law repealing the criminal statute provided otherwise. With full

knowledge of this law, Congress in drafting the Twenty-first Amendment and in the resolution passed by it to submit to the States assumed, and had a right to assume, that in construing the effect of the Amendment upon pending cases the courts would apply the general rule then in full force and vigor, and not the so-called "general rule" of the common law, which the court below and the Ninth Circuit applied—a rule which had been repudiated and annulled in the Federal and state governments.

If the Twenty-first Amendment is so construed, there can be no doubt of the validity of Section 13 of the Revised Statutes as now applied to the National Prohibition Act.

There is today a desire for uniformity in the law. This cannot be attained if repealing *constitutional enactments* are to be construed under the old common law rule, while repealing *statutory enactments* are to be constructed under a modern and contrary rule. Indeed, the intent of a Congress which *proposed* an Amendment could scarcely have been different from the intent of a Congress which *passed* a statute.

This Court, in *Funk* v. *United States*, No. 394, October Term, 1933, decided December 11, 1933, rejected an aged rule of the common law on the competency of witnesses even though it had not been changed by Congress. Its reasoning is pertinent here—"The public policy of one generation may not, under changed conditions, be the public policy of another." We submit that there is no reason why the courts should apply to this situation a rule of

construction of the common law which has been changed by Congress and by practically all the state legislatures rather than an existing rule of construction, substituted for the common law rule—and which rule of construction, if applied, will prevent defendants who have committed crimes under existing statutes from escaping punishment, and there will be obviated "the lame and impotent conclusion" referred to in the *Barr* case, and the serious consequences adverted to in *Hertz* v. *Woodman*.

The law should be so enforced as to apply alike to all. If the rule of construction contended for by the respondents is upheld, then the spectacle will be presented of some defendants committing a joint offense escaping punishment while others of the joint offenders may now be serving terms or may have paid fines imposed upon them. Let us take a case where four defendants were jointly indicted for the violation of the National Prohibition Act. The trial occurred more than three months before the Twenty-first Amendment was ratified. Three of the defendants were tried and convicted; one of them was fined and has paid his fine, the second was sentenced to prison and is now serving his term, the third was sentenced to prison but appealed his case which is now pending on appeal, and the fourth defendant ran away and has just been apprehended. If the old common law rule is applied, the defendant who appealed and the defendant who absconded will both go scot free. It was to avoid just such a result as this that Congress and the States changed the rule of the common law.

In the American Bar Association Journal of ~~October~~ November 1923 (pp. 715–721), there is an article by Albert Levitt on "Repeal of Penal Statutes and Effect on Pending Prosecutions," in which are cited most of the State and Federal cases dealing with the common-law rule. The writer reaches the conclusion that the rule is not based upon sound reason and that the repeal of a statute should have no effect whatever upon pending prosecutions founded upon the provisions of the repealed statute. No doubt Congress and the States were actuated by like reason in abrogating the common-law rule, for the crime is complete as of the date of the criminal act.

CONCLUSION

The Government submits that the "dead hand of the common law" should not be applied to such a case as we have here but "in the light of general authority and sound reason" the salutary, statutory rule of construction should be applied, which will result in the judgment of the lower court being reversed.

Respectfully submitted.

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January, 1934.

APPENDIX

The statutes of the several States which have abrogated the common law rule of construction are:

ALABAMA

Code of 1928, sec. 5532: No repeal, revision, amendment or alteration of any law shall in any manner affect any prosecution for an offense committed under the law so repealed, revised, amended, or altered, unless the repealing, revising, amending or altering law shall otherwise expressly provide * * *.

ARIZONA

Rev. Code 1928, sec. 3046: No action or proceeding commenced before any repealing act takes effect, and no right accrued is affected by such repealing act, but proceedings therein shall conform to the new act so far as applicable.

ARKANSAS

Statutes 1919, sec. 9758: When any criminal or penal statute shall be repealed, all offenses committed or forfeitures accrued under it while it was in force shall be punished or enforced as if it were in force, notwithstanding such repeal, unless otherwise expressly provided in the repealing statute.

CALIFORNIA

Political Code, 1923, sec. 329: The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the

law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act.

COLORADO

Compiled Laws, 1921, sec. 6519, sec. 4: The repeal, revision, amendment or consolidation of any statute or part of a statute or section or part of a section of any statute, shall not have the effect to release, extinguish, alter, modify or change in whole or in part any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such statute, unless the repealing, revising, amending or consolidating act shall so expressly provide * * *.

CONNECTICUT

General Statutes, 1930, sec. 6561: The repeal of any statute defining or prescribing the punishment for any crime shall not affect any pending prosecution or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute that such repeal shall have that effect.

FLORIDA

Constitution, Art. III, sec. 32: The repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment.

GEORGIA

Code, 1926, Penal Code, sec. 18: All crimes shall be prosecuted and punished under the laws in force at the time of commission thereof, notwithstanding the repeal of such laws before such trial takes place.

HAWAII

Revised Laws, 1925, sec. 25: No suit or prosecution pending at the time of the repeal of any law, for any offense committed, or for the recovery of any penalty or forfeiture incurred under the law so repealed, shall in any case be affected by such repeal.

IDAHO

Compiled Statutes, 1919, sec. 116: The repeal of any law creating a criminal offense does not constitute a bar to the indictment and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment and punishment is expressly declared in the repealing act.

ILLINOIS

Smith-Hurd Illinois Rev. Stats. 1929, chap 131, sec. 4: No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. * * *

INDIANA

Burns Annotated Indiana Stats., 1926, sec. 255: * * * And the repeal of any statute shall not have the effect to release or extinguish any penalty,

forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purposes of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

IOWA

Code, 1931, sec. 63: * * * The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed. * * *

KANSAS

Revised Statutes, 1923, sec. 77–201: In the construction of the statutes of this State the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute:

First. The repeal of a statute does not revive a statute previously repealed, nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed. * * *

KENTUCKY

Carroll's Statutes, 1930, sec. 465: No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any

penalty, forfeiture, or punishment so incurred, or any right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. * * *

MAINE

Revised Statutes, 1930, chap. 1, sec. 5: * * * The repeal of an act does not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, or proceeding pending at the time of the repeal, for an offense committed or for recovery of a penalty or forfeiture incurred under the act repealed. Actions pending at the time of the passage or repeal of an act are not affected thereby.

MARYLAND

Bagby's Annotated Code, 1924, Art. 1, sec. 3: The repeal of any statute "including the repeal of any part of the Code of Public General Laws or of the Code of Public Local Laws" shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

MASSACHUSETTS

General Laws, 1932 ed., chap. 4, sec. 6: * * *
First. * * *
Second. The repeal of a statute shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for any

offense committed, or for the recovery of a penalty or forfeiture incurred, under the statute repealed.

MICHIGAN

Act No. 25, Public Acts 1931: Sec. 4-a. The repeal of any statute or part thereof shall not have the effect to release or relinquish any penalty, forfeiture, or liability incurred under such statute or any part thereof, unless the repealing act shall so expressly provide, and such statute and part thereof shall be treated as still remaining in force for the purpose of instituting or sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

MINNESOTA

Mason's Minnesota Statutes, 1927, sec. 10930: Whenever a law is repealed which repealed a former law, the former law shall not thereby be revived, unless it is so specifically provided; nor shall such repeal affect any right accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the law repealed.

MISSISSIPPI

Annotated Code, 1930, sec. 1361: No statutory change of any law affecting a crime or its punishment or the collection of a penalty shall affect or defeat the prosecution of any crime committed prior to its enactment, or the collection of any penalty, whether such prosecution be instituted before or after such enactment; and all laws defining a crime or prescribing its punishment, or for the imposition of penalties, shall be continued in operation for the purpose of providing punishment for crimes committed under them, and for collection of such penalties, notwithstanding

amendatory or repealing statutes, unless otherwise specially provided in such statutes.

MISSOURI

Revised Statutes, 1929, sec. 661: No offense committed, and no fine, penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, shall be affected by such repeal; but the trial and punishment of all such offenses, and the recovery of such fines, penalties and forfeitures, shall be had, in all respects, as if the provisions had remained in force.

MONTANA

Revised Codes, 1921, chap. 5, sec. 97: The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act.

NEBRASKA

Compiled Statutes, 1929, secs. 49–301: Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute.

NEVADA

Hillyer's Compiled Laws, 1929, sec. 11265: The superseding of any law creating a criminal offense shall not be held to constitute a bar to the indictment or information and punishment of a crime already committed, or to bar the trial and punishment of a crime where an indictment or information

and punishment has been already found, for a violation of the law so superseded, unless the intention to bar such indictment, information and punishment where an indictment has been already found or an information filed, is expressly declared in the superseding act.

NEW HAMPSHIRE

Public Laws, 1926, chap. 2, sec. 36: No suit or prosecution, pending at the time of the repeal of an act, for any offense committed or for the recovery of a penalty or forfeiture incurred under the act so repealed, shall be affected by such repeal.

NEW JERSEY

Compiled Statutes, p. 4971, sec. 4: That no offense committed, and no liability, penalty or forfeiture, either civil or criminal, incurred previous to the time when any statutory provision shall be repealed or altered by this act, or by any act hereafter passed, shall be discharged or affected by the repeal or alteration of any statute under which such offense, liability, penalty or forfeiture was incurred, unless it be expressly declared in the act of the legislature whereby such repeal or alteration is or shall be made, that offenses, liabilities, penalties or forfeitures already committed or incurred shall be thereby released or discharged; * * *

NEW MEXICO

Statutes, 1929, Art. 4, sec. 33: No person shall be exempt from prosecution and punishment for any crime or offense against any law of this State by reason of the subsequent repeal of such law.

NEW YORK

Cahill's Consolidated Laws 1930, chap. 23, sec. 93: The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture, or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been affected.

Sec. 94: Unless otherwise specially provided by law, all actions and proceedings, civil or criminal, commenced under or by virtue of any provision of a statute so repealed, and pending immediately prior to the taking effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed.

NORTH CAROLINA

Code, 1931, sec. 8103: No offense committed and no penalty or forfeiture incurred under any of the statutes hereby repealed, and before the time when such repeal shall take effect, shall be affected by the repeal.

Sec. 8104: No action or proceedings pending at the time of the repeal, for any offense committed, or for the recovery of any penalty or forfeiture incurred under any of the statutes hereby repealed shall be affected by such repeal, except that the proceedings in such action or proceeding shall be conformed, when necessary, to the provisions of the Consolidated Statutes.

NORTH DAKOTA

Compiled Laws, 1913, sec. 7316: The repeal of any statute by the legislative assembly shall not have the

effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

OHIO

Throckmorton's Annotated Code, 1930, sec. 26: Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment of repeal, unless otherwise expressly provided in the amending or repealing act.

OKLAHOMA

Statutes, 1931, sec. 13911: The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute. (This section is Art. 5, sec. 54, of the State Constitution.)

OREGON

Annotated Code, 1930, sec. 14–1008: In all cases hereafter occurring where a criminal statute or a part of a criminal statute shall be either amended or repealed, the criminal statute or the part of the criminal statute so amended or repealed shall be and remain in

force for the purpose of authorizing the prosecution, indictment, trial, conviction and punishment of all persons who shall have violated such criminal statute or part of a criminal statute so amended or repealed prior to the taking effect of the act so amending or repealing such criminal statute or part of a criminal statute.

RHODE ISLAND

General laws, 1923, sec. 417: No suit, prosecution or indictment, pending at the time of the repeal of any statute for any offense committed, or for the recovery of any fine, forfeiture, or penalty, incurred under the statute so repealed, shall in any case be affected by such repeal, but such suit, prosecution, or indictment may be proceeded with, and such act shall be deemed to be in force for the purpose of prosecuting the same to final judgment and execution or sentence, as the case may be.

SOUTH DAKOTA

Compiled Laws, 1929, sec. 39: The repeal of any statute by the legislature shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

TENNESSEE

Code, 1932, sec. 12: Repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed.

UTAH

Compiled Laws, 1917, sec. 5842: The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred nor any action or proceeding commenced under or by virtue of the statute repealed.

VERMONT

General Laws, 1917, sec. 37: The repeal of an act shall not revive one which has been repealed, nor affect an act done, a right accruing or accrued, acquired or established, or a suit or proceeding had or commenced in a civil cause before the time when the repeal takes effect; nor shall it affect a suit pending at the time of such repeal for the recovery of a penalty or forfeiture incurred under the act so repealed.

VIRGINIA

Code, 1930, sec. 6: No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new law takes effect. * * *

WASHINGTON

Remington's Rev. Stats. An., 1932, sec. 2006: No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal,

unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. * * *

WEST VIRGINIA

Official Code, 1931, chap. 2, art. 2, sec. 8: The repeal of a law, or its expiration by virtue of any provision contained therein, shall not affect any offense committed, or penalty or punishment incurred, before the repeal took effect, or the law expired, save only that the proceedings thereafter had shall conform as far as practicable to the laws in force at the time such proceedings take place, unless otherwise specially provided; * * *

WISCONSIN

Statutes, 1929, sec. 370.04: The repeal of a statute hereafter shall not remit, defeat or impair any civil or criminal liability for offenses committed, penalties or forfeitures incurred or rights of action accrued under such statute before the repeal thereof, whether or not in course of prosecution or action at the time of such repeal; but all such offenses, penalties, forfeitures and rights of action created by or founded on such statute, liability wherefor shall have been incurred before the time of such repeal thereof, shall be preserved and remain in force notwithstanding such repeal, unless specially and expressly remitted, abrogated or done away with by the repealing statute. * * *

WYOMING

Revised Statutes, 1931, sec. 112–104: Whenever a statute is repealed or amended such repeal or amendment shall in no manner affect pending actions, prosecutions or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecutions or proceedings, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 659. October Term, 1933.

THE UNITED STATES OF AMERICA,
Appellant,

v.

BYRUM GIBSON and CLAUDE CHAMBERS.

On Appeal from the District Court of the United States for the Middle District of North Carolina.

BRIEF FOR DEFENDANTS-APPELLEES.

OPINION BELOW.

The opinion of the District Court may be found on R., p. 7.

JURISDICTION.

The judgment to be reviewed was entered December 6, 1933 (R., pp. 10 & 11), and the petition for appeal to this

Court was allowed December 12, 1933 (R., p. 11). The jurisdiction of this Court rests upon the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Was the District Court of the United States for the Middle District of North Carolina on December 6th, 1933, and thereafter, without jurisdiction and power to hear and determine cases involving the violation of the National Prohibition Act and conspiracy to violate said act, as amended and supplemented and to impose sentences for violation of said act, for the reason that the powers of Congress to enact such legislation, insofar as applicable to the Forty-eight states, under the Eighteenth Amendment of the Constitution of the United States was taken away by the people by the adoption of the Twenty-first Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED.

AMENDMENT XVIII.

1. After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

2. The congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

AMENDMENT XXI.

Article XXI of the Amendments to the Constitution was adopted on December 5, 1933, and provides:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by conventions in three-fourths of the several States:

"ARTICLE ——

"SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

ARGUMENT.

1.

ON DECEMBER 6th, 1933, THE DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA HAD NO JURISDICTION OF THE SUBJECT-MATTER CONTAINED IN THE INDICTMENTS AGAINST THE DEFENDANTS.

The National Prohibition Act and the Amendments thereto were enacted by Congress under the power granted to it through the Eighteenth Amendment to the Constitution of the United States. It must be conceded that Congress could not have passed the National Prohibition Act and the Amendments thereto except by reason of the power given to it by the Eighteenth Amendment to the Constitution of the United States. Congress can only enact such legislation as may be delegated to it by the Constitution of the United States and its Amendments.

On the 5th day of December, 1933, the President of the United States and the Secretary of State proclaimed the adoption of Amendment Number Twenty-One. Therefore, it was the duty of the presiding Judge of the District Court to take judicial notice that the Twenty-First Amendment was consummated on December 5th, 1933. *Dillon v. Gloss*, 256 U. S. 368.

Therefore, the Court was confronted with the situation of having in its Court the defendants who were indicted under the National Prohibition Act, but who had not been sentenced, which was passed pursuant to the powers given to Congress by the Eighteenth Amendment when the

Eighteenth Amendment was specifically and directly repealed by the Twenty-First Amendment to the Constitution of the United States. Could the Court proceed to judgment against the defendants when they were indicted under a law passed pursuant to an Amendment to the Constitution of the United States when that Amendment had been unqualifiedly repealed without a saving clause?

In order for the Court to proceed to judgment against a defendant in any criminal case, it must have jurisdiction first of the subject-matter; and, second, of the person whose rights are to be passed upon.

In *Cooley on Constitutional Limitations,* Fifth Edition, 493, it is said:

> "The proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act. Jurisdiction is, first, of the subject-matter; and, second, of the persons whose rights are to be passed upon.
>
> A court has jurisdiction of any subject-matter, if, by the law of its organization, it has authority to take cognizance of, try, and determine cases of that description. If it assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and rights of property cannot be divested by means of them.
>
> Accordingly, where a court by law has no jurisdiction of the subject-matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to its action, either by voluntarily commencing the proceeding as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal or informal action."

The subject-matter in the case at bar was a violation of the National Prohibition Act and Amendments thereto and when the provision of the Constitution pursuant to which the National Prohibition Act was passed was repealed, the subject-matter of the controversy and of the charge against the defendants ceased to exist and there was nothing for the District Court to do but to take cognizanee of that fact and dismiss the indictments and discharge the defendants. The subject-matter necessary to give the Court jurisdiction had ceased to exist.

In *Ex Parte McCardle,* 74 U. S. 506, a case in which the appellate jurisdiction of the United States Supreme Court in certain cases was taken away while a case was pending, Chief Justice Chase said:

> "What, then, is the effect of a repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is power to declare the law and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle."

It is elementary that the Constitution itself never yields to treaties or enactments of Congress and where they conflict the Constitution must prevail. Therefore, the National Prohibition Act has no force or effect save and except that which it derives from the Eighteenth Amendment and when the Eighteenth Amendment was repealed, all acts of Congress based upon the Eighteenth Amendment likewise ceased to exist insofar as the Forty-eight states are concerned.

It is the universally recognized rule of American and

English jurisprudence that the repeal of a criminal law before final judgment has been rendered deprives courts of power to proceed to judgment in pending criminal cases, unless there is a saving clause in the law. *Green v. United States of America,* in the United States Circuit Court of Appeals for the Ninth Circuit, decided December 14th, 1933; *Smallwood v. U. S. A.,* in the United States Circuit Court of Appeals for the Fifth Circuit, decided December 19th, 1933; *Gulf, Colorado, & Santa Fe Railway Company v. Dennis,* 224 U. S. 503; *Yeaton v. U. S.,* 5 Cranch 251; 36 Cyc. 1224; *Hartung v. People,* 22 N. Y. 95; *State v. Norwood,* 12 Md. 195; *Cooley's Constitutional Limitations,* Sixth Edition, 469; 2 *Sutherland Stat. Constr.,* Second Edition, #286; *Hollingsworth v. Va.,* 3 Dall. 378.

It is also a well-recognized rule of decision that when during the pendency in an appellate court of a criminal case, the law is changed and the statute creating the crime charged is repealed without any saving clause, the appellate court must dispose of the case under the law in force when its decision is rendered. *State v. Norwood,* 12 Md. 195; *Cooley's Constitutional Limitations,* Fifth Edition, 471; *Yeaton v. U. S.,* 5 Cranch 281; *U. S. v. Tynen,* 78 U. S. 88; *State v. Williams,* 97 N. C. 455; *State v. Long,* 78 N. C. 572; also *State v. Perkins,* 141 N. C. 797, and reported in 9 L. R. A. (N. S.) 165.

In the case of *U. S. v. Tynen, supra,* Mr. Justice Fields said:

> "By the repeal of the 13th section of the Act of 1813 all criminal proceedings taken under it fell. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence. By the repeal the legislative will is expressed that no further proceed-

ings be had under the Act repealed. In NORRIS v. CROCKER the Court said that, as the plaintiff's right to recover in that case depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject. As said by Mr. Justice Taney, in another case: 'The repeal of the law imposing the penalty is of itself a remission.' ''

In the case of *Gulf, Colorado, & Santa Fe Railway Company v. Dennis, supra,* in which the court cited criminal cases, including those heretofore cited in this Brief, in which the rule was applied, Mr. Justice Van Devanter said:

> "These questions may not be directly answered by the prior decisions of this court, but their right solution is more than suggested by the well-recognized rule of decision that when, during the pendency in an appellate court of an action for a penalty, civil or criminal, the statute prescribing the penalty is repealed, without any saving clause, the appellant court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered."

In *Yeaton v. U. S.,* 5 Cranch 281, an admiralty case, which was pending on appeal, and the Act under which the condemnation was declared was repealed, the Court held that the cause must be considered as if no sentence had been pronounced.

The Court held in an opinion by Chief Justice Marshall that the cause must be considered as if no sentence had been pronounced; and if no sentence had been pronounced, then, after the expiration or repeal of the law, no penalty

could be enforced or punishment inflicted for a violation of the law committed while it was in force, unless some express provision of statute was made for that purpose.

In *Wade v. St. Mary's Industrial Company*, 43 Md. 178, it was held that:

> "It is a settled doctrine that courts, in deciding questions arising before them, will look to the law as it is at the time, and are not to be governed by what it may have been—unless proceedings under a prior existing law had been complete or rights had become vested. This principle has been held to apply as well to cases before an appellate court as to those that are pending in courts of original jurisdiction."

In 36 Cyc. 1224, the following statement of law appears:

> "The general rule against the retrospective construction of statutes does not apply to repealing acts, and in the absence of a saving clause, or other clear expression of intention, the repeal of a statute has the effect of blotting it out as completely as if it had never existed and of putting an end to all proceedings under it."

In *White v. Clark*, 11 U. C. Q. B. 137, in which Tyndal, Chief Justice, says that the effect of repealing a statute is

> "to obliterate the statute repealed as completely from the records of Parliament, as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those acts or suits which were commenced, prosecuted, and concluded while it was an existing law."

In support of the argument that when a constitutional amendment is adopted it is effective immediately and courts no longer have jurisdiction of the subject-matter, we find in *Hollingsworth v. Va., supra,* in the argument of the Attorney-General, the following:

> "From the moment those who gave the power to sue a state, revoked and annulled it, the power ceased to be a part of the constitution; and if it does not exist there, it cannot in any degree be found, or exercised, elsewhere. The policy and rules, which in relation to ordinary acts of legislation, declare that no *ex post facto* laws shall be passed, do not apply to the formation, or amendment, of a constitution. The people limit and restrain the power of the legislation, acting under a delegated authority; but they impose no restraint upon themselves. * * * On general ground, then, it was in the power of the people to annihilate the whole, and the question is, whether they have annihilated a part of the judicial authority of the United States? * * * And the case of amendments is evidently a substantive act, unconnected with the ordinary business of legislation, and not within the policy, or terms, of investing the President with a qualified negative on the acts and regulations of Congress. * * * There can be no amendment of the Constitution, indeed, which may not, in some respect, be called *ex post facto;* but the moment it is adopted, the power it gives, or takes away, begins to operate, or ceases to exist."

It is fundamental law that the Federal Government is one of delegated powers. These powers appear and are contained in the Constitution of the United States, which is the fundamental law of the land. Unless some power appears in and is granted to the Federal Government by

the United States Constitution, no branch of the Federal Government can act with regard to any subject. In any given case, in order to ascertain whether or not a United States court has authority to entertain jurisdiction over and consider a case before it, we must look to that instrument granting the power to entertain such jurisdiction, the Constitution. This theory of the scheme and plan of the Federal Government has been accepted from the earliest times.

Where an Act of Congress conflicts with the Constitution of the United States, the fundamental law must govern and the statute fall. *Federalist No. LXXVIII.*

In the reference to the Federalist above cited will be found one of the earliest expressions of the theory and scheme of the Federal Government expressly stating that the judicial department of the United States, in considering causes before it, must turn first to the Constitution in order to ascertain what determination to make in a given case. Unless authority is granted by the Constitution to the Federal Government to act with regard to a subject-matter, no branch of the Federal Government has any right to act, whether it be the executive, legislative, or judicial. This rule of law is so firmly established that to cite authorities seems to be superfluous. However, the rule has been stated in such clear and illuminating language that it seems proper to look to a few of the adjudicated cases for this expression of the rule.

> "It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Government." *Dorr, et al., v. United States,* 195 U. S. 138.

The Federal courts have frequently refused to entertain jurisdiction over a cause because power was not

granted by the Constitution to consider the subject-matter involved.

The case of *United States v. Hudson, et al.*, 7 Cranch, 32, involved a prosecution for libel against the Government of the United States. The only question presented was whether the Circuit Courts of the United States could exercise a common law jurisdiction in criminal cases. The question was answered by the court in the negative, as follows:

> "The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general Government are made up of concessions from the several states; whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a consistent part of those concessions; that power is to be exercised by courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union."

It was then held that Federal courts could not entertain jurisdiction over the cause for the reason that no power authorizing such jurisdiction appeared in the Constitution.

Again, in *Ex Parte Farley*, 40 Federal, 66, it appeared that Farley and Wilson were indicted by a Federal grand jury impaneled by the United States for the Indian territory for the crime of larceny. They were tried, convicted and sentenced. The accused then petitioned for writs of *habeas corpus* on the ground that they were unlawfully restrained of their liberty contrary to the Constitution and laws of the United States, because the indictment was found by a grand jury impaneled without authority of law. The question presented to the court, then, was whether the court at Muskogee had power to impanel a grand jury, for if it

had no such power, the grand jury that found the indictment was an illegal body and the defendants were improperly indicted. In the course of its opinion the court said, at page 69:

> "All courts of the United States, whether they be the supreme court of the United States, circuit courts, district courts, United States territorial courts in the territories, or the court for the Indian Territory, established by the act of March 1, 1889, are creatures of the constitution, and the statutes passed in pursuance thereof, and they have only such jurisdictional powers as are conferred by the constitution or by statute."

An examinaton of the Constitution of the United States and of the Acts of Congress passed pursuant thereto disclosed no authority granted to United States courts in Indian territories to impanel grand juries in criminal cases, and the court held that in the absence of such authority the defendants were improperly indicted and convicted, and must be discharged.

Where a Federal court has no jurisdiction of the case, it has no power to make any order in it except to dismiss it for want of jurisdiction. *Fisk v. Union Pacific Railway Company, et al.*, 9 Federal Cases, No. 4827.

If an Act of Congress conflicts with the United States Constitution, it must be declared to be unconstitutional, for it can have no legal existence unless authority for it is found in the Constitution. This rule was declared by Chief Justice Marshall in the case of *Hodgson, et al., v. Bowerbank, et al.*, 5 Cranch, 303, where the pleadings in a cause described the plaintiffs as being "aliens and subjects of the king of the United Kingdom of Great Britain

and Ireland" and the defendants were described as "late of the district of Maryland, merchants." It was contended on the one hand that the courts of the United States had no jurisdiction over the cause, it not being stated that the defendants were citizens of any state. On the other hand, it was contended that the judiciary act gave jurisdiction to the circuit courts in all suits in which an alien is a party. Chief Justice Marshall, in a brief opinion, stated:

> "Turn to the article of the constitution of the United States, *for the statute cannot extend the jurisdiction beyond the limits of the constitution.*" (Italics supplied.)
>
> "The words of the constitution were found to be 'between a state, or the citizens thereof, and foreign states, citizens, or subjects.' "

The court stated the objection was fatal and the Federal courts could not entertain jurisdiction over the action. Here, then, is a case in which there was a direct conflict between the provisions of an act of Congress and the provisions of the Constitution. The judiciary act granted to the circuit courts jurisdiction over all causes in which an alien was a party. On the other hand, the Constitution granted jurisdiction to Federal courts in causes between states or citizens thereof and foreign states, citizens or subjects. The pleadings disclosed that the plaintiffs were aliens but did not disclose that the defendants were citizens of any state. The Constitution being the fundamental law of the land, and having defined the jurisdiction of the Federal courts, no act of Congress could extend that jurisdiction.

> "The decisions, above referred to, proceed upon the ground, that the general government itself is one

of limited powers, and hence possesses no authority to punish conduct, beyond what is expressly granted to it, or is necessary and proper to carry into effect what is expressly granted. That it hence follows, no conduct can be declared a crime by congress, which does not come within such power." *U. S. v. New Bedford Bridge,* 27 Federal Cases, 15867, page 102.

The question is one of jurisdiction over the subject-matter. There must be a valid and subsisting law of the United States in existence empowering the court to take cognizance of the case at the time judicial action is invoked. As a result of the adoption of the Twenty-first Amendment, and beginning with December 5, 1933, all power which had been granted by the Eighteenth Amendment was revoked, and with respect to the instant case, the situation stood as if the Eighteenth Amendment had never been enacted. Congress was, as of December 5, 1933, without power to concern itself with the possession and transportation of liquor within the State of North Carolina. The matter of defining crimes and punishing criminals in that field then belonged to the State of North Carolina. Therefore, if the District Court of the United States for the Middle District of North Carolina possessed the power and authority to try and dispose of the instant case, it was because of the existence of some legislation continuing in force the provisions of the National Prohibition Act and Section 37 of the Criminal Code penalizing a conspiracy to commit an offense against the United States, the effect of which is to confer or continue jurisdiction in the District Court by a statute after all authority in Congress to legislate in that field had become inoperative.

If any Federal court lacks the authority to proceed in a cause by reason of the absence of a constitutional

grant of power, all Federal courts must likewise lack such power. Therefore, where an appeal from a judgment involving violations of the National Prohibition Act, or of conspiracy to violate the National Prohibition Act, is pending in any Federal appellate court, that court can do but one thing; that is, remand the case with directions to dismiss it. No other order affirming or disaffirming the judgment of the lower court can be entered, for to make such an order would be to give life to a dead statute which has no constitutional authority. To make such an order, authority must be present not in the statutes of the United States but in the Constitution, and if no such authority is found in the Constitution, the courts have no power to make or execute the order.

In order to give jurisdiction to a Federal Court in any case whatever, the Constitution and the statute law must concur. It is not sufficient that the jurisdiction may be found in the Constitution or the law, the two must cooperate: the Constitution as the fountain and the laws of Congress as the streams through which the waters of jurisdiction flow to the Court. This results necessarily from the structure of the Federal government. It is a government of granted and limited powers. *U. S. v. Brooklyn Ferry Co.*, 21 Fed. 331; *In Re Barry*, 42 Fed. 113; *In Re Metzger*, 17 Fed. cases, No. 9511.

Although it is necessary for the constitution and the law to concur in order to give jurisdiction, the government insists in the instant case that the defendants should be punished although the life and vitality which gave the Court jurisdiction of the subject-matter has ceased to exist and is now constitutionally and legally dead.

2.

SECTION 13 IS NOT APPLICABLE TO THE FACTS IN THIS CASE FOR THE REASON THAT A CONSTITUTIONAL AMENDMENT IS HERE INVOLVED, AND FOR THE ADDITIONAL REASON THAT THE NATIONAL PROHIBITION ACT HAS NOT BEEN REPEALED BUT ONLY RENDERED OBSOLETE AND INOPERATIVE IN THE FORTY-EIGHT STATES.

Section 13 of the Revised Statutes (U. S. C., title 1, Section 29) provides:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

The government admits that if it were not for Section 13 of the Revised Statutes that it would be conceded that the ruling of the court below was correct. The government contends that Section 13 of the Revised Statutes, which is called by the government the "principle of statutory construction," required that the defendants be sentenced, even though the law under which they were indicted had been repealed.

It should be conceded in this case that if the National Prohibition Act had been repealed by an Act of Congress and had not been rendered obsolete by virtue of the Twenty-

first Amendment, that Section 13 of the Revised Statutes would have permitted the Court to proceed to judgment. But that statute applies only to a statute repealed by an act of Congress and could not apply to an Act which had been rendered obsolete by a Constitutional Amendment for the reason that the repeal of the Eighteenth Amendment having taken away the power of Congress to legislate on the subject of prohibition, and there being no saving clause in the Twenty-first Amendment to the Constitution, therefore Section 13 is not applicable where the legislation has been rendered obsolete, not by the repeal of the legislation by a legislative body having authority to enact the legislation, but by it being rendered inoperative by virtue of a Constitutional Amendment to the Constitution of the United States, which repealed the Amendment authorizing the particular legislation and withdrawing the authority to legislate at all on that subject. In such a situation Congress would be powerless to enact a saving clause either before or after such legislation has been nullified, unless the saving clause was contained in the proposed Amendment, and therefore Section 13 would be inapplicable to a penal statute rendered inoperative.

It is admitted that Section 13 applies only to an act which has been repealed. Section 13 is not applicable to the case at bar for the reason that the National Prohibition Act has not been repealed but has been rendered inoperative and obsolete insofar as the Forty-eight states are concerned.

Therefore, we are confronted with a situation like that in *Moore v. U. S.*, 85 Fed. 465, where the act for which the defendant was tried was still a crime, but as applicable to him it no longer existed. It had not been repealed, as it still was in force in the other territories and possessions of the United States. But by virtue of the fact that no provision had been made continuing the act under consid-

eration and no transfer of jurisdiction from the territorial court to the Circuit Court had been provided, the Circuit Court of Appeals held that no punishment could be inflicted for its violation then for the reason that the law had expired insofar as the State of Utah was concerned.

It will be observed that in *Yeaton v. U. S.*, 5 Cranch, 281, which was cited in the Moore case, Chief Justice John Marshall intimated that in reference to a law that no longer existed, it might be rendered inoperative as to a person either by *expiration or the repeal of the law.*

In the case of *Moore v. U. S., supra,* after quoting Section 13 of the Revised Statutes, the Court said:

> "It is clear from the language of the Section that it applies only to cases where the statute defining an offense has been REPEALED. The Act of July 2nd was not repealed by the enabling act, for it yet applied to the territories of the United States."

In *Yeaton v. U. S.*, 5 Cranch, 281, Chief Justice John Marshall said:

> "It has been long settled on general principles that, AFTER THE EXPIRATION OR REPEAL OF A LAW, no penalty can be enforced nor punishment inflicted for violations of the law committed while it was in force, unless some express provision be made for that purpose by statute."

The appellees contend that the National Prohibition Act has not been repealed, but has only been rendered obsolete as to the Forty-eight states for it yet applies to the District of Columbia, Alaska, Hawaii, and the other possessions of the United States.

If an act is repealed in any case as far as the act itself is concerned, it is dead. That the National Prohibition is not repealed and still applicable to the District of Columbia, Alaska, Hawaii and the other possessions of the United States, we have a statement by Honorable Homer S. Cummings, now Attorney-General of the United States, who, on December 2, 1933, among other things, it was stated:

> "7. Effective permit bonds given under the provisions of Regulations 2, covering tax-paid liquors, shall be terminated as to future liability as of the date the Eighteenth Amendment is repealed, except in the District of Columbia, Alaska, Hawaii, and such other possessions and territories wherein the National Prohibition Act is regarded as remaining in force after repeal of the Eighteenth Amendment."

The above being Section 7 of a bulletin issued by the Treasury Department, dated December 2, 1933.

Another reason that Section 13 is inapplicable to the points presented in this case is that in no view can a constitutional amendment be termed a Congressional enactment or a statute. If the construction is given Section 13 as desired by the government it would in effect be broadening that section to the extent that Congress could pass an Act directing how the judiciary would be forced to construe a constitutional amendment.

It is not necessary to state that Congress could not pass an act which would bind this Court as to the rules that it would have to apply in construing the Constitution or any amendments thereto.

To declare what the law is, or has been, is a judicial power. That the judiciary is the final authority in the

construction of the Constitution and the laws is too well founded to need any citation of authorities.

A further reason why Section 13 is inapplicable to the effects of a constitutional amendment is observed in that a proposal by Congress of a constitutional amendment does not partake of the ordinary class of legislation (a statute) for that it is not necessary that the president's approbation be received, as required by the Constitution, Article 1, Section 7, in the ordinary cases of legislation.

This point was made in *Hollingsworth v. Va.*, 3 Dall. 378, that the Eleventh Amendment was void for the reason that it was not submitted to the President for his approbation, but during the argument of the Attorney-General, Mr. Justice Chase interrupted to say:

> "There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition or adoption of Amendments to the Constitution."

Therefore, a constitutional amendment is not a statute or a Congressional enactment, and if it is not, Section 13 could not be applicable.

Section 13 is just as inapplicable to the first count in the bill of indictment which charges a conspiracy to commit an "offense against the United States * * *," as defined by Section 37 of the Criminal Code, as it is to the second and third counts which charged a violation of the National Prohibition Act, to wit, the possession and transportation of liquor.

To constitute a criminal offense under Section 37, the object of the conspiracy must be to commit some offense against the United States; that is, to do some act made a crime by the laws thereof: *In re Wolf*, 27 F. 606, 610-611.

"The premise of these contentions is admitted. Since there are no common law offenses against the United States, the offenses mentioned in Section 37 of the Criminal Code must be statutory." *U. S. v. Haas*, 163 Fed. 908.

"In the light of the foregoing consideration, we think Section 37 of the Criminal Code was intended as a broad and comprehensive provision denouncing conspiracies to commit offenses created by any of the statutes of the United States as a crime." *Thomas v. U. S.*, 156 Fed. 897; *Ford v. U. S.*, 273 U. S. 593.

With the repeal of the Eighteenth Amendment the possession and transportation of liquor in North Carolina ceased to be an "offense against the United States."

One cannot be held for conspiracy to do an act which is not a crime. *Woo Wai v. United States*, 223 F. 412.

In the last cited case, at page 414, it was said:

"The facts as testified to by the defendants, and as supplemented by the evidence for the United States, fall short of showing that there was in fact a conspiracy to commit a criminal act within the meaning of section 5440 (Section 37, Criminal Code). It was the intention of the officers who induced Woo Wai and his associates to attempt to bring Chinese across the Mexican border that the law should not be violated. They intended to prevent the consummation of the offense which they lured the defendants to undertake. Their purpose was to intercept the Chinese so brought across the border, and return them to the country whence they came. Woo Wai and his associates, therefore, although they were not aware of that fact, were engaged in an act which was not to result in an accomplished offense against

the laws of the United States * * * If no violation of the law was to be accomplished by the act of the defendants, it follows that they could not be held for conspiracy to do that act."

Since the ratification of the 21st Amendment, there is no constitutional authority in Congress to legislate with respect to the transportation and possession of intoxicating liquor within a state. There can be no punishable conspiracy to violate a penal statute which has no support in the Constitution. *U. S. v. U. S. Brewers' Association*, 239 F. 163.

"The offenses provided for by the statute in question do not consist in the mere 'banding' or 'conspiring' of two or more persons together, but in their banding or conspiring with the intent, or for any of the purposes specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intend to hinder or prevent, was one granted or secured by the Constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any Act of Congress.

We have in our political system a Government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. Slaughter-House Cases, 16 Wall. 74, 21 L. ed. 408. * * * Circuit courts have no

common law jurisdiction of offenses of any grade or description; and it is equally clear that the appellate jurisdiction of the Supreme Court does not extend to any case or any question, in a case not within the jurisdiction of the subordinate Federal Courts. State v. Wheeling Bridge Co., 13 How. 563; U. S. v. Hudson, 7 Cranch, 32." *United States v. Cruikshank,* 92 U. S. 503, 548, 549, 564.

If the foregoing is not sound reasoning, we face the anomaly of acquitting the defendants for possessing and transporting liquor because with the effective date of the 21st Amendment, it was no longer a crime or an offense against the United States to transport or possess liquor wholly within a state and no conviction was possible for a conspiracy to do that which the law does not declare to be an offense or crime against the United States. Apparently the only adjudicated case holding that no conviction can be had upon an indictment for a conspiracy to violate the provisions of a statute which has been repealed, is *Powell, et al., v. People,* 5 Hun (N. Y.) 169, affirmed 63 N. Y. 88.

There is no need to point out the difference between a constitutional amendment and a statutory enactment. One is the voice of the people acting in their sovereign capacity, and the other the voice of the legislative branch of the government, to whom has been entrusted the exercise of powers of government by the people. In the cases cited in the Brief of the government in reference to Section 13 of the Revised Statutes, these cases hold that this section, when there is no saving clause, is to be read and construed as a part of all statutes subsequently repealed in order to give effect to the will and intent of Congress. It must be observed in the instant case that we are not dealing with the repeal of a statute in which it is necessary

to give effect to the will and intent of Congress, but on the contrary, we are dealing with the repeal of an Amendment to the Constitution of the United States by another Amendment and the latter Amendment should be given the effect that the people acting in their sovereign capacity desired and expected.

3.

THE TWENTY-FIRST AMENDMENT IS TO BE CONSTRUED IN REFERENCE TO THE KNOWN CONDITION OF AFFAIRS OUT OF WHICH THE OCCASION FOR ITS ADOPTION AROSE AND TO EFFECTUATE INSTANTLY THE SOLEMN ACT OF THE PEOPLE AS INDICATED IN THE ADOPTED AMENDMENT.

Aside from the decisions of the courts in reference to a situation as presented in this case, it seems that it would be useless and unwarranted to punish a person for the violation of a law that the majority of the people of these United States have decided that they no longer wanted. Indeed, it would be depriving a person of his liberty and property without due process of law and not by the "law of the land" for that the "law of the land" on December 6th, 1933, no longer contained that for which the defendants stood indicted before the District Court.

It is apparent from the overwhelming majority which the Twenty-First Amendment received that the condition of affairs out of which the occasion for its adoption arose was such that the people no longer desired prohibition as administered under the Eighteenth Amendment and the Acts of Congress passed pursuant thereto.

In the case of *Maxwell v. Dow,* 176 U. S. 580, Mr. Justice Peckham, speaking for the Court, said:

> "A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three-fourths of the states before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted."

Therefore, the defendants contend that the trial Court was without jurisdiction of the subject-matter or power to proceed to sentence the defendants on December 6th, for that the law on which they were indicted had been nullified by an overwhelming majority of the people of the United States and that it was the wish of the people that persons no longer be deprived of their liberty and property for the violation of the National Prohibition Act or its Amendments.

If it had been the intention of Congress in proposing the Twenty-first Amendment to the people to have wanted those who had violated the National Prohibition Act sentenced after the Twenty-first Amendment was adopted, it would have contained a saving clause that the violators of the National Prohibition Act prior to the adoption of the Twenty-First Amendment were to be punished and dealt with as if the Amendment had not been adopted.

It will be observed that the prohibitions of the Eighteenth Amendment did not become effective until one year

after its adoption and likewise it could have been proposed, if Congress had so desired, that all persons charged with violation of the National Prohibition Act prior to the adoption of the Twenty-First Amendment should be tried and sentenced until one year after its adoption.

As said by the presiding Judge in his opinion in this case (R., p. 7):

> "If the National Prohibition Act is still in force, Amendment XXI is denied immediate effect; it is postponed until all violations of the Prohibition Act, occurring before December 5, 1933, are finally disposed of by the Courts. Thus, the two Amendments would exist at the same time, notwithstanding that one repeals the other. The people granted the powers enumerated in Amendment XVIII, but they revoked those powers by Amendment XXI. The revocation occurred when the repeal was ratified. It was not repealed in part, but it was repealed in its entirety."

It will further be observed that in the instant case we are dealing with a constitutional amendment—an amendment that was adopted by the overwhelming majority of the people. The government, in its Brief, says:

> "The law which struck down and repealed the statute under which the respondents were indicted was a constitutional enactment, and this enactment of Congress, approved by the requisite number of states, became the supreme law of the land—a repealing act of the highest dignity."

Yet, it is insisted on behalf of the government that a citizen's liberty and property should be taken away from him at a time when the voice of the people have spoken and

the crime for which his liberty and property is now demanded no longer is a crime and the supreme law of the land. What good would be served, what principles of government would be maintained by depriving a person of his liberty and property for a crime that was only *malum prohibitum* and which became so obnoxious to the American people that it was wiped out in less than a year from the time the Amendment was proposed by Congress—although seven years was allowed for it to be approved. One of the suggestions why the defendants should now be sentenced and deprived of their liberty and property for the violation of this dead law is that some who violated it and have been punished will be unequally dealt with in comparison with the defendants. This argument on the part of the government that equality should be done to the violators of the National Prohibition law and that this court should waive aside the constitutional guaranties of a citizen and vested rights which they have in the law in order that all violators of the prohibition law should share equally is not persuasive when it requires this court to repudiate the long established principles of law in American and English jurisprudence. The government quotes the opinion of this Court in the recent case of *Funk v. U. S.*, in which the court said:

> "The public policy of one generation may not, under changed conditions, be the public policy of another."

We agree that this reasoning is very pertinent here and the repudiation of the Eighteenth Amendment by such a tremendous majority by the American people indicated that they no longer wanted National Prohibition, and that this Court should in passing upon the questions here presented give effect to the reasons in this country which

prompted the prompt enactment of the Twenty-first amendment. The expression of popular will has seen fit to declare dead the Eighteenth Amendment and the National Prohibition Act and its Amendments. The people have spoken in no uncertain terms. The voice of the people acting in their sovereign capacity have seen fit in their judgment to say that the offenses created by Congress pursuant to the powers directed to it by the Eighteenth Amendment are no longer to be construed as part of the law of the land. In Cooley on Constitutional Limitations, Fifth Edition, page 747, it is said:

> "Although by their constitutions the people have delegated the exercise of sovereign powers to the several departments, they have not thereby divested themselves of the sovereignty. They retain in their own hands, so far as they have thought it needful to do so, a power to control the governments they create, and the three departments are responsible to and subject to be ordered, directed, changed, or abolished by them. But this control and direction must be exercised in the legitimate mode previously agreed upon. The voice of the people, acting in their sovereign capacity, can be of legal force only when expressed at the times and under the conditions which they themselves have prescribed and pointed out by the constitution, or which, consistently with the constitution, have been prescribed and pointed out for them by statute;"
>
> "Language granting constitutional powers is liberally construed to effectuate its purposes, and the same rule applies to limitations, for the true spirit of Constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose." *Fairbanks v. United States,* 181 U. S. 283, 289.

It will be conceded that the acts charged in the bill of indictment against the defendants were crimes *mala prohibita* and not *mala in se*. This being true, it would seem that the strict construction which the government desires in this matter should not be given as the offense charged against the defendants was never a crime in this country until January 16th, 1920, and by the voice of the people it ceased to be a crime December 5, 1933, and, therefore, there was no element of great moral turpitude involved in the offense charged against the defendants, it being only a crime by virtue of the will of the people.

4.

REPLY TO POINT THREE OF THE GOVERNMENT'S BRIEF IN REFERENCE TO DECISIONS INVOLVING CHANGES FROM TERRITORIAL TO STATE GOVERNMENTS INDICATE THAT THE COURTS STILL HAVE POWER OVER NATIONAL PROHIBITION ACT VIOLATIONS.

The defendants do not think the argument presented under Point Three of the government's Brief applicable to the instant case for the reason that there was an enabling statute which transferred the jurisdiction from the Courts of the territory to the Courts of the new state and, therefore, does not deal with the repeal of any law. Indeed, the only time that this situation has been presented whereby a law was repealed is the case of *Moore v. U. S.*, 85 Fed. 465, which is cited in the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Green v. U. S., supra.*

CONCLUSION.

Taking the argument of the government as outlined in its Brief, as we construe it, that unless Section 13 saves them, the ruling of the court below is correct, and that section applying only to a statute or congressional enactment, that has been repealed, and this case involving a constitutional amendment and the National Prohibition Act still being applicable to certain possessions of the United States, but obsolete and inoperative as to the Forty-eight states, it follows that the ruling of the Court below was correct and the judgment in this case should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 659.—October Term, 1933.

The United States of America, Appellant, *vs.* Claude Chambers and Byrum Gibson.	Appeal from the District Court of the United States for the Middle District of North Carolina.

[February 5, 1934.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Claude Chambers and Byrum Gibson were indicted in the District Court for the Middle District of North Carolina for conspiring to violate the National Prohibition Act, and for possessing and transporting intoxicating liquor contrary to that Act, in Rockingham County in that State. The indictment was filed on June 5, 1933. Chambers pleaded guilty but prayer for judgment was continued until the December term. On December 6, 1933, the case was called for trial as to Gibson. Chambers then filed a plea in abatement and Gibson filed a demurrer to the indictment, each upon the ground that the repeal of the Eighteenth Amendment of the Federal Constitution deprived the court of jurisdiction to entertain further proceedings under the indictment. The District Judge sustained the contention and dismissed the indictment. The Government appeals. 18 U. S. C. sec. 682.

This Court takes judicial notice of the fact that the ratification of the Twenty-first Amendment[1] of the Constitution of the United

[1]Article XXI of the Amendments of the Constitution provides as follows:

"Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress".

States, which repealed the Eighteenth Amendment, was consummated on December 5, 1933. *Dillon* v. *Gloss*, 256 U. S. 368. Upon the ratification of the Twenty-first Amendment, the Eighteenth Amendment at once became inoperative. Neither the Congress nor the courts could give it continued vitality. The National Prohibition Act, to the extent that its provisions rested upon the grant of authority to the Congress by the Eighteenth Amendment, immediately fell with the withdrawal by the people of the essential constitutional support. The continuance of the prosecution of the defendants after the repeal of the Eighteenth Amendment, for a violation of the National Prohibition Act alleged to have been committed in North Carolina, would involve an attempt to continue the application of the statutory provisions after they had been deprived of force. This consequence is not altered by the fact that the crimes in question were alleged to have been committed while the National Prohibition Act was in effect. The continued prosecution necessarily depended upon the continued life of the statute which the prosecution seeks to apply. In case a statute is repealed or rendered inoperative, no further proceedings can be had to enforce it in pending prosecutions unless competent authority has kept the statute alive for that purpose.

The decisions of this Court afford abundant illustration of this principle. In *Yeaton* v. *The General Pinkney*, 5 Cranch, 281, 283, where the statute under which a ship had been condemned in admiralty had expired while the case was pending on appeal, the Court held that the cause was to be considered as if no sentence had been pronounced. Chief Justice Marshall said that "it has long been settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute". Chief Justice Taney observed in *Maryland* v. *Baltimore & Ohio R. R. Co.*, 3 How. 534, 552. "The repeal of the law imposing the penalty, is of itself a remission". In *United States* v. *Tynen*, 11 Wall. 88, 95, the Court thus stated the principle applicable to criminal proceedings: "There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under

the Act repealed". See, also, *Norris* v. *Crocker*, 13 How. 429, 440; *Gulf, Colorado & Santa Fé Rwy. Co.* v. *Dennis*, 224 U. S. 503, 506.

The Government endeavors to avoid the application of this established principle by invoking the general saving provision enacted by the Congress in relation to the repeal of statutes. That provision is to the effect that penalties and liabilities theretofore incurred are not to be extinguished by the repeal of a statute "unless the repealing act shall so expressly provide," and to support prosecutions in such cases the statute is to be treated as remaining in force. R. S., sec. 13; 1 U. S. C. sec. 29.[2] But this provision applies, and could only apply, to the repeal of statutes by the Congress and to the exercise by the Congress of its undoubted authority to qualify its repeal and thus to keep in force its own enactments. It is a provision enacted in recognition of the principle that, unless the statute is so continued in force by competent authority, its repeal precludes further enforcement. The Congress, however, is powerless to expand or extend its constitutional authority. The Congress, while it could propose, could not adopt the constitutional Amendment or vary the terms or effect of the Amendment when adopted. The Twenty-first Amendment contained no saving clause as to prosecutions for offenses theretofore committed. The Congress might have proposed the Amendment with such a saving clause, but it did not. The National Prohibition Act was not repealed by Act of Congress but was rendered inoperative, so far as authority to enact its provisions was derived from the Eighteenth Amendment, by the repeal, not by the Congress but by the people, of that Amendment. The Twenty-first Amendment gave to the Congress no power to extend the operation of those provisions. We are of the opinion that in such a case the statutory provision relating to the repeal of statutes by the Congress has no application.

The Government cites decisions involving changes from territorial to state governments and recognizing the authority of the Congress to provide for the transfer of pending cases from terri-

[2]The text of the provision is as follows: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability".

torial courts to the courts established within the new States. *Pickett* v. *United States,* 216 U. S. 456; *United States* v. *Baum,* 74 Fed. 43; compare, *Moore* v. *United States,* 85 Fed. 465. These decisions present no analogy to the instant case. As the function and jurisdiction of territorial courts would naturally terminate when a territory becomes a State, some provision for the transfer of pending business is necessary and the Congress has adequate authority to that end. The Constitution authorizes the Congress to admit new States into the Union (Art. IV, sec. 3, par. 1), and, also, to provide in the case of crimes, not committed within any State, for trial at such place as the Congress may direct (Art. III, sec. 2, par. 3). The Congress, in admitting a new State, may thus transfer "jurisdiction in respect of local matters to state courts and of civil and criminal business and jurisdiction arising under the laws of the United States to courts of the United States when they should come into existence". *Pickett* v. *United States, supra,* at p. 459; *Forsyth* v. *United States,* 9 How. 571, 576, 577. In such cases, jurisdiction for the trial of pending criminal actions depends upon the provisions of the enabling Act. *Id.* Provision in the enabling Act for the vote of the people of the territory, as a condition precedent to the establishment of the new State and the adoption of its constitution, does not alter the fact that the State is admitted to the Union by the Congress under its constitutional authority. In the instant case, constitutional authority is lacking. Over the matter here in controversy, power has not been granted but has been taken away. The creator of the Congress has denied to it the authority it formerly possessed and this denial, being unqualified, necessarily defeats any legislative attempt to extend that authority.

Finally, the argument is pressed that the rule which is invoked is a common law rule and is opposed to present public policy. We are told that the rule of construction, evidenced by the saving provision adopted by the Congress in relation to the repeal of statutes, is firmly entrenched and attention is directed to corresponding statutory provisions in most of the States. But these state statutes themselves recognize the principle which would obtain in their absence. The question is not one of public policy which the courts may be considered free to declare, but of the continued efficacy of legislation in the face of controlling action of the people, the source

of the power to enact and maintain it. It is not a question of the developing common law. It is a familiar maxim of the common law that when the reason of a rule ceases the rule also ceases. See *Funk* v. *United States,* 290 U. S. —. But, in the instant case, the reason for the rule has not ceased. Prosecution for crimes is but an application or enforcement of the law, and if the prosecution continues the law must continue to vivify it. The law, here sought to be applied, was deprived of force by the people themselves as the ineseapable effect of their repeal of the Eighteenth Amendment. The principle involved is thus not archaic but rather is continuing and vital,—that the people are free to withdraw the authority they have conferred and, when withdrawn, neither the Congress nor the courts can assume the right to continue to exercise it.

What we have said is applicable to prosecutions, including proceedings on appeal, continued or begun after the ratification of the Twenty-first Amendment. We are not dealing with a case where final judgment was rendered prior to that ratification. Such a case would present a distinct question which is not before us.

The judgment dismissing the indictment is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.